Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

MUKESH SHRETTA AND GOLD RUSH II, INC.
D/B/A CLUB TAJ MAHAL,

Petitioners,

vs.

THE CITY OF MARIETTA, GEORGIA,
BETTY L. HUNTER, M.C. PETE WALDREP, JR.,
DANIEL O. COX, SR., E. PAUL SABISTON,
JAMES C. DODD, AND FRANK T. AYERS,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether it is a violation of the Equal Protection Clause of the Fourteenth Amendment for a court to treat a licensing ordinance differently from a zoning ordinance for the purpose of determining the existence of vested rights.

2. Whether the First and Fourteenth Amendments required the City of Marietta to base its determination as to any adverse and pernicious secondary effects of three adult entertainment establishments on actual empirical evidence available from a study of the subject facilities instead of general studies of out-of-state locales at other periods of time not shown to be relevant to the targeted establishments in determining whether a municipal ordinance affecting protected speech is content neutral or content specific.

3. Whether twenty-four hours general notice that an ordinance affecting the adult entertainment and alcoholic beverage licenses of licensees was to be adopted was sufficient to constitute procedural due process pursuant to the Fourteenth Amendment where no opportunity to present evidence was afforded, no cross-examination was allowed, and only ten minutes was allotted to each license holder to present its views.

4. Whether the denial of a licensee's right to renew its alcoholic beverage license constituted a taking of licensee's private property without just compensation in contravention of the Fifth and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

This case is one of three cases consolidated for trial. The other cases are set out in App. 1.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Gold Rush II, Inc. d/b/a Club Taj Mahal and Mukesh Shretta, respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Georgia.

OPINIONS BELOW

The opinion of the Georgia Supreme Court filed in case number S96A1494, March, 17, 1997, is reported as *Goldrush II, Inc. v. City of Marietta*, 482 S.E.2d 347 (Ga. 1997), reconsideration denied, April 3, 1997, and is reproduced at App. 1.

The decision and opinion of the Superior Court of Cobb County, filed April 2, 1996, is unreported and is reproduced at App. 2.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Georgia was entered on March 17, 1997. App. 1. A petition for reconsideration was denied on April 3, 1997. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution, Appendix 3.

2. The Fifth Amendment to the United States Constitution, Appendix 4.

3. The Fourteenth Amendment to the United States Constitution, Appendix 5.

4. Code of Ordinances of the City of Marietta, Georgia, Section 8-5032, Appendix 6.

STATEMENT OF CASE

During March, 1993, Mukesh Shretta (hereinafter "Shretta") and Gold Rush II, Inc., a Georgia corporation, d/b/a "Club Taj Mahal" (hereinafter "Taj"), applied for an Adult Entertainment License and Alcoholic Beverage Licenses at 1830 Cobb Parkway, Marietta, Georgia pursuant to licensing ordinances then in effect.

No construction funds were allocated, and no construction started until the licensing process had been completed and Taj and Shretta had received clearance for an Adult Entertainment License and Liquor, Beer, and Wine licenses for the location.

During every stage of the construction process, permits were applied for from the City of Marietta with full disclosure that the facility being constructed was a single-purpose facility, and was designed specifically for the production of adult entertainment in the form of nude

dancing and the sale of alcohol. Construction was completed and Club Taj Mahal opened on November 17, 1993.

On the date of opening, Shretta and Taj had invested in the facility the following amounts: Land, $1,000,000; Construction, $1,928,000; and Furniture and Fixtures, $420,000; totalling $3,348,000.

Shretta and Taj operated Club Taj Mahal from November 17, 1993, until January 18, 1995, without any indication that their licenses were to be impinged upon or new rules adopted. The Adult Entertainment License and Alcoholic Beverage Licenses were renewed in due course for the year 1994 and for the year 1995.

On January 18, 1995, at approximately 5:30 p.m., Shretta and Taj were delivered copies of a letter notifying them that the Marietta City Council was holding a special meeting to consider amending the Adult Entertainment and Alcoholic Beverage Ordinances. This was the first notice of Marietta's intention to take any action regarding adult entertainment or liquor ordinances despite assiduous efforts on the part of Taj, Shretta and their attorneys to ascertain whether such action was being contemplated. It was ascertained later that while Shretta and Taj were being told that no action was contemplated, draft copies of the proposed ordinance were circulated among various churches in the Marietta area.

On January 19, 1995, representatives of Shretta and Taj attended the City Council meeting and objected to the meeting proceeding on due process and on other grounds. Subject to a complete reservation of rights, Shretta and Taj participated in the meeting to the extent

they were allowed. Speakers were only allowed ten minutes to state their position without opportunities to present evidence or to cross-examine witnesses.

In determining whether to vote yea or nay on the ordinance, the Council considered *only* certain studies from out-of-state locations presented by the City Attorney at the beginning of the Council meeting, and a report presented by the Chief of Police showing the number of police calls from certain selected restaurants and bars in the City of Marietta.

There was no testimony concerning the applicability of the studies to the City of Marietta nor any discussion of any increase in crime regarding the three existing adult entertainment facilities. To the contrary, when the Chief of Police was questioned, he admitted that other areas of the City of Marietta, without nude dancing, had much higher crime rates.

Councilman Philip Goldstein discussed at length the neighborhoods surrounding the three existing clubs with Chief Carter and the incidence of crime around those clubs. There was *no direct evidence* from Chief Carter concerning the effect of the three existing nude dance clubs on the crime rate in the City of Marietta.

In regard to the other reports submitted to the Council, each Councilman testified on deposition that he accepted such reports at face value and made no effort to adapt said reports to the City of Marietta or determine the relevancy of said reports.

Each Councilman recognized the fact that the reports were at least ten years old and some were dated back to 1977.

Councilman Goldstein, at great length, pointed out the deficiencies in said reports and set out reasons why said reports could not reasonably be relied upon.

Despite the warnings from Councilman Goldstein, the Marietta City Council voted six to one to adopt the ordinance. The Mayor then approved this action.

After the adoption of the ordinance, Shretta and Taj engaged the services of a well-known and respected appraisal firm to conduct an economic impact study on six (6) adult entertainment locations in the north Atlanta area. That study shows without equivocation that property values in the vicinity of the existing Marietta clubs, and three others similarly situated, have increased in value, there is no neighborhood blight, and no increase in crime.

Shretta and Taj engaged the services of John C. Villines, a nationally recognized security consultant, to analyze the report submitted by the Marietta Police Department to the City Council on January 19, 1995. Mr. Villines found the methodology of said report to be so flawed that no reasonable reliance could be placed upon it. Depositions of all Council Members were taken by Shretta and Taj, and it was established that each member of the City Council who voted in favor of the January 19, 1995 Ordinance relied *only* upon the studies and the report of the Police Department. No other evidence was introduced.

Several months after the adoption of the Ordinance, Shretta and Taj filed suit in the Superior Court of Cobb County, Georgia to overturn the offending ordinance. The City timely filed an answer to the Complaint and filed a motion for summary judgment on September 1, 1995. On April 2, 1996, the motion for summary judgement of the City was granted, and on April 29, 1996, Shretta and Taj filed their notice of appeal. The Supreme Court of Georgia issued its decision affirming the grant of summary judgment on March 17, 1997. A motion for reconsideration was timely filed along with a motion to stay remitter. On April 3, 1997, the motion for reconsideration was denied, and the motion for stay granted.

It should be noted that all of the facts set out hereinabove were uncontested.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This Court should grant the writ in order to resolve issues which affect every business owner whose livelihood depends upon the renewal of an existing license. The Georgia court ruled that no licensee can achieve a property right which rises to the level of protection under the Constitution of the United States where such licenses expire annually, despite the fact that the license holders may have "committed their lives and their capital to building their businesses which need licenses to operate." *Goldrush II v. City of Marietta*, 482 S.E.2d at 361. In reaching its conclusion, the Georgia court improperly found that there is a distinction between zoning ordinances and

licensing ordinances in determining whether a vested right exists; erroneously found that due process allowed the use of certain studies remote in place and time, while it ignored up-to-date studies of the locations at issue; approved very limited hearing rights as adequate procedural due process protection; and ruled that no private property rights were taken without just compensation by the denial of necessary licenses.

If uncorrected, this ruling will allow licensing authorities to impose their likes and dislikes upon licenses at the end of each year regardless of the commitment of time and money invested in reliance on such licenses and without fear of constitutional redress. Today's flavor of the month is alcohol – tomorrow it may be the gypsy fortune teller or the minority street vendor or anyone whose business falls into disfavor.

I.

IT IS A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT FOR A COURT TO TREAT A LICENSING ORDINANCE DIFFERENTLY FROM A ZONING ORDINANCE FOR THE PURPOSE OF DETERMINING THE EXISTENCE OF VESTED RIGHTS.

Under the facts as determined in the court below, there is no rational reason to treat a licensing ordinance differently than a zoning ordinance for the purpose of determining whether vested rights exist. As recently as the last term, this Court in *Romer v. Evans*, ___ U.S. ___, 116 S. Ct. 1620 (1996) reaffirmed the long-held constitutional precept that distinctions made by state governments must "bear[] a rational relation to some legitimate

end" in order to satisfy the strictures of the Fourteenth Amendment. *Id.* at 1627. Here, it is unquestioned that the City of Marietta used its licensing authority to accomplish a result which it could not have achieved by use of its zoning authority, *i.e.*, deprive a business owner of his vested right to continue a pre-existing use. The scrutiny of a governmental distinction should be particularly acute where, as in the instant case, such action has a chilling effect on protected speech (here, nude dancing, *See e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *Harris v. Entertainment Systems, Inc.*, 386 S.E.2d 140 (Ga. 1989)).

The court in the instant case stated that while it has

> acknowledged the existence of constitutionally protected vested zoning rights of a property owner, under certain conditions, so as to preclude retroactive application of a zoning ordinance, the same is not applicable to licenses to conduct a business.

Goldrush II, 482 S.E.2d at 360 (citations omitted).

This ruling of the court below directly contradicts its own position stated just last year in *Recycle & Recover, Inc. v. Georgia Board of Natural Resources*, 466 S.E.2d 197 (Ga. 1996) where it did *not* distinguish between zoning authority pursuant to the police power and permit authority pursuant to the same power. In *Recycle & Recover* the Georgia Supreme Court considered a permit for the construction and operation of a solid waste treatment facility. Shortly after obtaining its permit, Recycle filed an application for a major modification of the facility. Before the Board took final action on Recycle's application, the General Assembly amended the law to provide that a major

modification could not be granted sooner than three years from the date any such facility commenced operation. Based upon the amendment, the Board denied Recycle's application. The Superior Court on review found that the Board's decision was appropriate and did not violate Recycle's constitutional rights. On appeal to the Georgia Supreme Court, the decision below was reversed and in so doing, the court found that the property owner had a vested right to consideration of his application under statutory law then in existence and stated:

> *Just as requiring permits for solid waste disposal is an exercise of police power, so too is the regulation of zoning.* . . . In either instance, our Constitution prohibits a legislative exercise of the police power so as to injure the vested rights of citizens.

Id. at 199 (emphasis added) (citations omitted).

The instant case was decided on motion for summary judgment with virtually all of the evidence being uncontradicted by the City of Marietta. The following facts were not controverted in any way and must be taken as true and correct: (1) Before the licensees purchased the land, they advised the City of Marietta of their intent to construct an extremely expensive single-purpose facility to present nude dancing and serve alcohol and obtained the City's approval; (2) The City of Marietta approved the construction of the facility at every stage by issuing electrical permits, sewer permits, construction permits, conducting inspections and issuing a certificate of occupancy at completion; (3) By opening day, licensees invested more than $3,348,000 entirely in reliance upon the reasonable expectation that they would be able to conduct their

business during good behavior; (4) In the entire history of alcoholic beverage regulation in the City of Marietta, no license renewal application was denied; and (5) Licenses for Club Taj Mahal were renewed routinely in 1994 and 1995.

Under the above-stated facts, there is no justification for distinguishing between the grant of a license which is calculated to induce investment, and which induces investment, and a zoning permit which does the same. Zoning ordinances and alcoholic beverage ordinances proceed from the same constitutional well-spring, *i.e.*, the police power of the state. The court below, by its own admission, would recognize a vested right in petitioners' use of their property if § 8-5032 of the Marietta City Code was classified as a zoning ordinance rather than a liquor ordinance. *Goldrush II*, 482 S.E.2d at 360.

Every day, in the United States, thousands of people risk their lifestyles and life savings in the start-up of businesses which require renewable governmental licenses to operate. Small business is the underpinning of the United States economy. Far more jobs are created by small businesses than by major corporations. The issue presented here is not merely a nude-dancing issue. To the contrary, it applies to every mom and pop business, medium-sized endeavor, and major corporation required to renew business licenses on a periodic basis.

II.

THE FIRST AND FOURTEENTH AMENDMENTS REQUIRED THE CITY OF MARIETTA TO BASE ITS DETERMINATION AS TO ANY ADVERSE AND PERNICIOUS SECONDARY EFFECTS OF THREE ADULT ENTERTAINMENT ESTABLISHMENTS ON ACTUAL EMPIRICAL EVIDENCE AVAILABLE FROM A STUDY OF THE SUBJECT FACILITIES INSTEAD OF GENERAL STUDIES OF OUT-OF-STATE LOCALES AT OTHER PERIODS OF TIME NOT SHOWN TO BE RELEVANT TO THE TARGETED ESTABLISHMENTS IN DETERMINING WHETHER A MUNICIPAL ORDINANCE AFFECTING PROTECTED SPEECH IS CONTENT NEUTRAL OR CONTENT SPECIFIC.

In assessing the governmental interest in the offending ordinance, the court below relied exclusively upon certain studies involving out-of-state locales and dated as much as twenty years ago. On deposition, each member of the Marietta City Council stated that he relied solely upon the studies and a list of police calls in determining whether to vote yea or nay on the ordinance. During the course of the hearing prior to vote, Councilman Philip Goldstein pointed out in great detail the deficiencies of the studies submitted and set out reasons why the studies could not reasonably be relied upon. Councilman Goldstein referred to tax records and other data to demonstrate that there had been no pernicious secondary effects connected with the operation of the three nude dance clubs in the City of Marietta.

After the ordinance was passed, Shretta and Taj commissioned studies which showed that Councilman Goldstein was correct that there were no pernicious secondary effects connected with the Marietta nude clubs.

The court below ignored all evidence to the contrary and held that

> the city substantiated its declaration that the amended ordinance was necessary to curb the unwanted secondary effects of mixing alcohol and adult entertainment through the experiences of other cities that the council members reasonably believed to be relevant to the problems faced by Marietta.

Goldrush II, 842 S.E.2d at 357.

The Georgia court relied upon *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1985) for the proposition that the Marietta City Council was entitled to rely on studies of other cities. The relevant language in *Renton* is found at 475 U.S. at 51:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is *reasonably believed to be relevant* to the problem that the city addresses.

Id. (emphasis added).

The Supreme Court of Georgia has consistently misconstrued the message of *Renton*. *Renton* involved two existing theaters which were acquired by the plaintiff for the purpose of commencing the showing of adult films. *Renton* did not involve existing adult entertainment facilities. Consequently there were no empirical facts concerning the operation of the theaters available to study. Secondly, the City of Renton is in the State of Washington

and only a short distance from the City of Seattle whose studies were approved by the Court.

In the instant case there are three existing adult facilities which have been in business for as long as five years. The actual facts were easily ascertained. Councilman Goldstein recited facts specific to the City of Marietta to show that there were no pernicious secondary effects connected with the operation of the three Marietta adult clubs. Once these specific facts were introduced into the record, it became necessary for the City to produce specific evidence of local activities to overcome Councilman Goldstein's assertions.

The burden was on the City of Marietta to prove that it could reasonably believe that the studies were relevant to the problem allegedly existing in the City of Marietta.

In *Krueger v. City of Pensacola,* 759 F.2d 851 (11th Cir. 1985) the 11th Circuit was confronted with a Pensacola ordinance which prohibited nudity in commercial establishments that served alcoholic beverages. The sole evidence that the ordinance furthered a substantial governmental interest consisted of evidence showing that it was more difficult to control the offense of "B-drinking" in topless bars than elsewhere. In reversing the trial court and invalidating the ordinance, the 11th Circuit first ruled that since the ordinance infringed on protected expression

> we must require the government to show that its interests in regulating such activity is based on

> something other than a desire to censor the communication because of the community's dislike of its content.

Id. at 854.

In *Leverette v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985) the same court reiterated that the city had the burden of proof and in *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987), the 9th Circuit stated that

> the county must show that in enacting the particular limitations it places upon adult theaters, it relied upon evidence permitting the reasonable inference that, absent such limitations, the adult theaters would have harmful secondary effects. . . .

Id. at 1335. *See also Christy v. City of Ann Arbor*, 824 F.2d 489 (6th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1983); *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659 (8th Cir. 1981).

Neither the *Renton* case nor any of its progeny is authority for the proposition that studies remote in time and place can override current local empirical facts that demonstrate conclusively that such studies are not relevant to local conditions. A governing entity cannot constitutionally close its eyes to proven empirical facts and rely instead on theoretical data in determining whether pernicious secondary effects are attributable to existing adult entertainment facilities. The requirement that the studies be such as may be *reasonably relied upon* carries with it the requirement that reason must be used not

defused or short circuited to accomplish a result which is improperly desired.

III.

TWENTY-FOUR HOURS GENERAL NOTICE THAT AN ORDINANCE AFFECTING THE ADULT ENTERTAINMENT AND ALCOHOLIC BEVERAGE LICENSES OF LICENSEES WAS TO BE ADOPTED WAS NOT SUFFICIENT TO CONSTITUTE PROCEDURAL DUE PROCESS WHERE NO OPPORTUNITY TO PRESENT EVIDENCE WAS AFFORDED, NO CROSS-EXAMINATION WAS ALLOWED, AND ONLY TEN MINUTES WAS ALLOTTED TO EACH LICENSE HOLDER TO PRESENT ITS VIEWS.

On January 18, 1995, at approximately 5:30 p.m., Shretta and Taj were delivered copies of a letter notifying them that the Marietta City Council was holding a special meeting on January 19, 1995, to consider amending the City's adult entertainment and alcoholic beverage ordinances. This letter was the first and only notice of Marietta's intention to take any action regarding adult entertainment or liquor ordinances despite assiduous efforts on the part of Taj, Shretta, and their attorneys to ascertain whether such action was contemplated. It was ascertained later that while Shretta and Taj were told that no action was contemplated, draft copies of the proposed ordinance were circulated among various churches in the Marietta area.

At the hearing on January 19, 1995, speakers were allowed only ten minutes to state their positions without any opportunity to present evidence or to cross-examine witnesses.

In *Bell v. Burson*, 402 U.S. 535, 539 (1971) this Court stated that

> [o]nce licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. . . . [I]n such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment . . . whether the entitlement is denominated a 'right' or a 'privilege.'

In *Harris v. Entertainment Systems*, 386 S.E.2d 140, 143 (Ga. 1989), the Georgia Supreme court stated that

> [a] liquor license is an entitlement to operate a business, a business upon which a person's livelihood is dependent. Furthermore, often, as in this case, substantial amounts of property are invested in the business that is dependent on the continuation of the license for its term.

See Page v. Jackson, 398 F. Supp. 263 (N.D. Ga. 1975) (liquor license sufficient property interest entitling rudimentary due process protections); *Johnson v. Brown*, 584 F. Supp. 510 (N.D. Ga. 1984) (sufficient interest in the sale of malt beverages for minimum due process standards to apply).

The character and sufficiency of a proceeding or hearing requisite to due process must be appropriate, fair, adequate and such as is practical and reasonable in the particular case. *Dohany v. Rogers*, 281 U.S. 362 (1930). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Whatever the quality of the property interest, it is clear that the revocation of an existing license requires minimal due process. The same is true of a failure to renew an existing license. In the instant case, no meaningful hearing was allowed. Licensees were allowed only ten minutes to speak after being afforded twenty-four hours notice, with no opportunity to present evidence or to cross-examine witnesses. Taj and Shretta had at risk more than three million dollars and were afforded only the "hearing" described hereinabove. There was hardly time for the speaker to introduce himself before his time was up. Such treatment does not comport with the due process guaranties of the Fourteenth Amendment.

IV.

DENIAL OF A LICENSEE'S RIGHT TO RENEW ITS ALCOHOLIC BEVERAGE LICENSE CONSTITUTED A TAKING OF LICENSEE'S PRIVATE PROPERTY WITHOUT JUST COMPENSATION IN CONTRAVENTION OF THE FIFTH AND FOURTEENTH AMENDMENTS.

As pointed out heretofore, the instant case was decided upon motion for summary judgment. Taj and Shretta submitted evidence that eighty percent of the gross revenues of Club Taj Mahal were alcohol related and that one hundred percent of the profits were derived from alcohol sales. Taj and Shretta further showed that the elimination of their alcoholic beverage licenses would lead to economic ruin and a complete loss of their business and that the business property had no other economically viable use. This evidence was uncontroverted.

In *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 587 (11th Cir. 1990) the court stated that "[a] regulation may

meet the standards necessary for exercise of police power, but still result in a compensable taking." In *Rymer v. Douglas County*, 764 F.2d 796, 800 (11th Cir. 1985) the court noted that "[t]here is no set formula for making the determination of whether a regulation is so onerous as to make it confiscatory."

Because of the uncontroverted nature of the evidence that the enforcement of the challenged ordinance constituted a complete taking, this case is brought within the ambit of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1009 (1992). In *Lucas* this court considered a South Carolina coastal regulation which was adopted after the Plaintiff acquired two (2) beach-front lots. The regulation prohibited the building of any habitable edifice on the property. At the time the lots were acquired, both were zoned for single-family, residential construction and there were no restrictions imposed upon such use by any governmental agency. The trial court held that the building prohibition deprived Lucas of any reasonable economic use of the lots and constituted a taking of the property. The Supreme Court of South Carolina reversed the trial court. On petition for certiorari, this Court reversed the South Carolina Supreme Court and in so doing stated:

> As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation . . . *'denies an owner economically viable use of his land.'*

Id. at 1016 (citations omitted).

This Court went on to state:

> We believe similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that

> prohibit all economically beneficial use of land: any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place land ownership.

Id. at 1029.

Club Taj Mahal is a single-purpose facility constructed at a cost of more than three million dollars. Based upon uncontradicted evidence, the club has no viable use other than the purpose for which it was built, *i.e.*, the presentation of nude dancing in company with the service of alcohol. When Taj and Shretta made their multi-million dollar commitment they were entitled to rely on the law then in effect, and on the prospect of being in business so long as there was no cause for the revocation of their licenses. Failure to renew the club's alcoholic beverage licenses will mandate it out of existence. The Fourteenth Amendment requires that such taking of personal property be compensable or be void.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX 1

S96A1494. GOLDRUSH II et al. v. CITY OF MARIETTA et al.
S96A1496. VARSALONA'S ITALIAN RESTAURANT d/b/a Boomer's et al. v. CITY OF MARIETTA et al.
S96A1497. TUDOR et al. d/b/a CYPRUS LOUNGE v. CITY OF MARIETTA et al.

BENHAM, Chief Justice.

Appellants are establishments which provide adult entertainment and are located within the City of Marietta. For several years, each establishment has applied for and received annual licenses issued by the City authorizing the businesses to provide adult entertainment and to serve alcoholic beverages.[1] In January 1995, acting pursuant to the authority granted by a 1994 amendment to the Georgia Constitution, the Marietta City Council passed an amendment to the city's adult entertainment ordinance which amendment provided that a liquor license would not be issued for a location at which was performed entertainment that required the issuance of an adult entertainment license. In effect, the amended adult entertainment ordinance banned alcohol in adult entertainment establishments by requiring an applicant to choose between obtaining a liquor license or obtaining a license to provide adult entertainment. The amended ordinance also provided that licenses previously granted would not be subject to the amendment until December 31, 1995, "at which time all licensees within the City of

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[1] Cyprus Lounge had adult entertainment and liquor licenses for 1992, 1993, 1994, and 1995; Boomer's had the necessary permits for 1991, 1992, 1993, 1994, and 1995, and Goldrush II for 1993, 1994, and 1995.

Marietta shall be subject to this provision, including those licensees licensed before the effective date hereof."

Following passage of the 1995 amendment to the city's adult entertainment ordinance, each of the appellants filed a separate action against the city, its council members, and its mayor, seeking a declaratory judgment on the constitutionality of certain provisions of Marietta's ordinances; injunctive relief against enforcement of the ordinances; and damages. Appellant Cyprus Lounge also sought a writ of mandamus requiring the city to issue to it adult entertainment and liquor licenses for 1996. The trial court consolidated the three cases and, after an extended hearing, granted summary judgment to the defendants and denied injunctive relief to the plaintiffs. Each of the businesses and the person to whom the adult entertainment and liquor licenses were issued appealed the trial court's judgment to this Court, and we have consolidated the three appeals.[2]

1. The 1995 Marietta ordinance amendment was enacted following the ratification of an amendment to the Georgia Constitution which is now embodied in Art. III, Sec. VI, Par. VII. The constitutional amendment gives the State of Georgia "full and complete authority to regulate alcoholic beverages and to regulate, restrict, or prohibit activities involving alcoholic beverages[,]" including the regulatory authority given the States by the Twenty-first Amendment to the U. S. Constitution. The constitutional

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[2] According to the trial court's order, the parties agreed in December 1995 that the businesses could continue to serve alcohol and provide adult entertainment pending resolution of appeals filed in this court.

amendment goes on to delegate this regulatory authority to the counties and municipalities of Georgia "for the purpose of regulating, restricting, or prohibiting the exhibition of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages. . . . " Before the trial court, as well as on appeal, appellant Boomer's contends that the constitutional amendment is a fatally overbroad unconstitutional infringement upon the freedom of expression guaranteed by the First Amendment to the U. S. Constitution.

The constitutional amendment's authorization to the State to "regulate, restrict, or prohibit activities involving alcoholic beverages" and its delegation of regulatory authority to local governments to regulate, restrict, or prohibit nudity, partial nudity, or depictions of nudity, without regard to whether the activity limited or the nudity proscribed is constitutionally protected, run counter to the holdings in *Harris v. Entertainment Systems*, 259 Ga. 701 (386 SE2d 140) (1989), and *Pel Asso, Inc. v. Joseph*, 262 Ga. 904 (427 SE2d 264) (1993). In those cases, this court found a statute and an ordinance overbroad because one went beyond "prohibiting nude dancing in bars" and the other applied to mainstream performance houses and private conduct as well as barroom nude dancing. Despite the appearance of similar overbreadth in the 1994 constitutional amendment, we decline to brand the constitutional amendment as unconstitutionally overbroad because we perceive a fundamental distinction between it and the statute and ordinance which were found lacking in *Harris* and *Pel Asso*: the

constitutional amendment is not a self-executing amendment, but requires the passage of legislation to give it effect.

> "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law."

Davis v. Burke, 179 U. S. 399, 403 (21 SC 210, 45 LE 249) (1900), quoting Cooley, Constitutional Limitations. The constitutional amendment at issue here is not self-executing because it "merely indicates a line of policy or principle without supplying the means by which such policy or principle are to be carried into effect," and because "it appears from the language . . . that subsequent legislation was contemplated to carry it into effect." 16 CJS 123, 126, Constitutional Law, § 46. The 1994 constitutional amendment "clearly anticipates" the enactment of legislation by the General Assembly or a local governing body to implement the principles set forth in the amendment. *Cox v. French*, 640 SW2d 786 (Ark. 1982). See *J.W.A. v. State of Ga.*, 233 Ga. 683 (212 SE2d 849) (1975). Because implementation of the constitutional amendment requires legislative enactment, the constitutional amendment is not effective until the legislation is passed. *State v. Pendergrass*, 633 P2d 1113 (Hawaii 1981). See also *DeKalb County v. Allstate Beer*, 229 Ga. 483 (2) (192 SE2d 342) (1972). Consequently, while the wording of the constitutional amendment authorizes enactment of local legislation that would be condemned as overbroad, it is the

language of the enacted local legislation, not the constitutional amendment, which must be examined for overbreadth. That being so, we decline to declare the constitutional amendment unconstitutionally overbroad.

2. (a) Appellant Varsalona asserts that the 1994 constitutional amendment violates the Georgia constitutional provision prohibiting the presentation to voters of a proposed constitutional amendment containing more than one subject matter. 1983 Ga. Const., Art. X, Sec. I, Par. II.

"The test of whether . . . a constitutional amendment violates the multiple subject matter rule is whether all of the parts of . . . the constitutional amendment are germane to the accomplishment of a single objective. [Cit.]" *Carter v. Burson*, 230 Ga. 511 (3) (198 SE2d 151) (1973). See also *Sears v. State*, 232 Ga. 547 (5) (208 SE2d 93) (1974). It is apparent that the general purpose of the amendment is the regulation of alcoholic beverages. Because the portion of the amendment delegating to local governmental units the authority to regulate the exhibition of nudity in connection with the sale of alcoholic beverages is germane to the general subject of the regulation of alcoholic beverages, the amendment does not violate the prohibition against multiple subject matters.

(b) Varsalona also contends that the wording of the ballot[3] concerning the constitutional amendment

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[3] The ballot read as follows:

Shall the Constitution of the State of Georgia be amended so that alcoholic beverages and activities involving nudity and alcoholic beverages, such as in nude dance clubs, may be regulated, restricted, or prohibited by counties and

deceived the voters of Georgia, resulting in a violation of the due process guarantees of the Fourteenth Amendment to the U. S. Constitution. We disagree.

"[T]his court . . . [conducts] only a minimal review of ballot language if the State followed all of the constitutionally and statutorily required procedures for amending the constitution. . . . " *Donaldson v. Dept. of Transp.*, 262 Ga. 49, 51 (414 SE2d 638) (1992). There is no contention in the case at bar that the prescribed amendment procedure was not followed. "The only limitation on the General Assembly in drafting ballot language is that the language be adequate to enable the voters to ascertain which amendment they are voting on. [Cit.]." Id. See also *Burton v. Georgia*, 953 F2d 1266, 1269 (11th Cir. 1992) ("As long as citizens are afforded reasonable opportunity to examine the full text of the proposed amendment, . . . substantive due process requires no more than that the voter not be deceived [by the ballot language] about what amendment is at issue.") We conclude that the language used on the ballot is not susceptible to appellant's attack for it clearly enabled the voters to ascertain what amendment they were voting on.

3. Since the constitutional amendment which authorized the passage of the 1995 amendment to Marietta's ordinance has withstood Boomer's constitutional attack, we next focus our attention on the analytical approach to be taken with regard to the amended ordinance in light of

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municipalities and so that the state shall have full and complete authority to regulate alcoholic beverages under the powers granted by the Twenty-First Amendment to the United States Constitution?

the passage of the constitutional amendment. In *Harris v. Entertainment Systems*, 259 Ga. 701 (1) (b), supra, this Court concluded that the State's exercise of its police power, as far as nude dancing is concerned, was limited by Georgia's constitutional guaranty of free expression, and scrutinized the statute which impinged upon protected expression under the state constitution's free speech clause, Art. I, Sec. I, Par. V. See *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252 (297 SE2d 250) (1982). The Court took that approach after conceding the possibility that passage of the Twenty-first Amendment to the federal constitution restored to the State police power otherwise limited by the First Amendment, but noting that the freedom of expression protected by the state constitution had not been similarly limited by ratification of a state constitutional amendment equivalent to the Twenty-first Amendment.[4] Id. See also *Chambers v. Peach County*, 266

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[4] Georgia is not alone in using its state constitutional guaranty of freedom of expression, unburdened by a "mini-Twenty-first Amendment," to find unconstitutional a statute or ordinance proscribing nude dancing in establishments with liquor licenses. See *Mickens v. City of Kodiak*, 640 P2d 818 (Alaska 1982); *Bellanca v. N.Y. State Liquor Auth.*, 429 NE2d 765 445 NYS2d 87 (1981); *Commonwealth v. Sees*, 373 NE2d 1151 (Mass. 1978); *Cleveland's P.M. on the Boardwalk v. Ohio Liquor Control Comm.*, 1997 Ohio App. LEXIS 231 (Jan. 23, 1997); *Sekne v. City of Portland*, 726 P2d 959 (Or. App. 1986). Cf. *Knudtson v. City of Coates*, 519 NW2d 166 (Minn. 1994) (where the Minnesota Supreme Court, after noting that the Minnesota Constitution did not contain a provision equivalent to the Twenty-first Amendment, found the ordinance in question did not violate the state constitution's free speech guaranty because it was a reasonable exercise of police power only incidentally controlling free speech); *City of Billings v. Laedeke*, 805 P2d 1348

Ga. 318 n. 2 (467 SE2d 519) (1996); *Pel Asso, Inc. v. Joseph*, supra, 262 Ga. 904, 905 n. 1; *Gravely v. Bacon*, 263 Ga. 203, 208 (429 SE2d 663) (1993) (Hunt, P.J., concurring). But see *Illusions on Peachtree Street v. Young*, 257 Ga. 142 (3) (356 SE2d 510) (1987), where this court, faced with a First Amendment challenge to a city ordinance, relied on the broad power to regulate alcohol it said had been given local governments by the Twenty-first Amendment; and *Jackson v. Three Aces Co.*, 249 Ga. 395, 396 (291 SE2d 522) (1982), where this court stated that the Twenty-first Amendment vested state and local governments with "broad, sweeping authority to refuse to license the sale of liquor in establishments in which even non-obscene naked dancing is performed. [Cit.]"

Believing the passage of the 1994 constitutional amendment to have provided the Georgia Constitution with its equivalent of the Twenty-first Amendment to the U. S. Constitution[5] and relying on U. S. Supreme Court case law, the trial court concluded that Marietta's amended ordinance should be analyzed under the principles of the Twenty-first Amendment rather than the First

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(Mont. 1991) (where the Montana Supreme Court noted the absence from its state constitution of a Twenty-first Amendment equivalent and then determined that Montana's free speech guaranty was co-extensive with the First Amendment).

[5] The Twenty-first Amendment to the U. S. Constitution did two things: it repealed the Eighteenth Amendment which totally prohibited the manufacture, sale, or transportation of intoxicating liquors within the United States and its territories, and it "delegated to the several States the power to prohibit commerce in, or the use of, alcoholic beverages." 44 *Liquormart v. Rhode Island*, 517 U. S. ___ (116 SC 1495, 134 LE2d 711) (1996).

Amendment. Faced, however, with a dearth of Georgia case law examining a local ordinance enacted after the 1994 constitutional amendment, the trial court relied on pre-amendment case law and applied Georgia's free expression analysis, the *Paramount Pictures* test, to the amended ordinance. See *Paramount Pictures v. Busbee*, supra, 250 Ga. 252. We conclude that, under recent case law from the U. S. Supreme Court, the trial court was in error when it determined that passage of the 1994 constitutional amendment required analysis of the Marietta ordinance under the Twenty-first Amendment. However, as will be seen, the trial court's use of the applicable *Paramount Pictures* test rendered the error harmless.

It is easy to see why the trial court believed that freedom of expression had been supplanted by the authority delegated to the States by the Twenty-first Amendment and by the authority delegated by the State of Georgia to local governments in the 1994 constitutional amendment. In *California v. LaRue*, 409 U. S. 109, 118 (93 SC 390, 34 LE2d 342) (1972), the U. S. Supreme Court concluded an opinion in which it held that California's regulations prohibiting certain sexual performances and the dispensation of liquor were not violative of the First Amendment by stating that, "[g]iven the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires," it could not hold the state regulations facially invalid under the U. S. Constitution. In *Doran v. Salem Inn*, 422 U. S. 922, 932-933 (95 SC 2561, 45 LE2d 648) (1975), the Court, summarizing its *LaRue* construction of the Twenty-first Amendment, stated that "the broad powers of the States

to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program." See also *City of Newport v. Iacobucci*, 479 U. S. 92, 95 (107 SC 383, 93 LE2d 334) (1986). In *N.Y. State Liquor Auth. v. Bellanca*, 452 U. S. 714, 717 (101 SC 2599, 69 LE2d 357) (1981), the Court held that the State's power under the Twenty-first Amendment to ban the sale of alcohol entirely "includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." Although the U. S. Supreme Court has repeatedly noted that the Twenty-first Amendment does not qualify individual rights protected by the Bill of Rights (*Craig v. Boren*, 429 U. S. 190 (97 SC 451, 50 LE2d 397) (1976)) or override any other relevant constitutional provision (*California v. LaRue*, supra, 409 U. S. at 120) (Stewart, J., concurring), the Court's statements in *LaRue*, *Doran*, *Bellanca*, and *Iacobucci* became the basis for rulings by state appellate courts which upheld a statute or ordinance banning non-obscene nude dancing in a location with a liquor license.[6] See *State v. Larson*, 653 S2d 1158 (La. 1995); *Proctor v. County of Penobscot*, 651 A2d 355 (Me. 1994); *City of Billings v. Laedeke*, 805 P2d 1348 (Mont. 1991); *Misleh v. State*, 799 P2d 631 (Okla. Cr. App. 1990); *State of Idaho v. Pierandozzi*, 784 P2d 331 (Idaho 1989); *Morris v. Municipal*

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[6] An entertainment program may not be prohibited solely because it contains nudity. *Schad v. Borough of Mt. Ephraim*, 452 U. S. 61, 67 (101 SC 2176, 68 LE2d 671) (1981). The "customary 'barroom' type of nude dancing" may involve expression minimally protected by the First Amendment. *Doran v. Salem Inn*, supra, 422 U. S. at 932.

Court, 652 P2d 51 (Cal. 1982); *Nall v. Baca*, 626 P2d 1280) (N.M. 1980); *Barmat v. Robertson*, 611 P2d 101 (Ariz. App. 1980). As was noted earlier, this court also saw the power of the Twenty-first Amendment as a means by which expression might be controlled. See *Illusions*, supra, 257 Ga. 142; *Three Aces Co.*, supra, 249 Ga. 395.

This long-used rationale has been called into question by the Supreme Court's recent disavowal of the reasoning in *LaRue* "insofar as it relied on the Twenty-first Amendment." *44 Liquormart v. Rhode Island*, 517 U. S. ___ (116 SC 1495, 134 LE2d 711) (1996). In *44 Liquormart*, the Supreme Court explained that the Twenty-first Amendment "limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its border, [but] . . . 'does not license the States to ignore their obligations under other provisions of the Constitution.' [Cit.]." Id., 116 SC at 1514. The Court noted that each State has ample power "[e]ntirely apart from the Twenty-first Amendment," i.e., the police power, to prohibit the sale of alcoholic beverages in inappropriate locations, and that the *LaRue* decision would have reached the same result had the Court relied exclusively on the State's exercise of its police power instead of buttressing it with the regulatory authority provided by the Twenty-first Amendment. In conclusion, the Supreme Court expressly held that "the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." Thus, "the suggestion in [*LaRue*, *Doran*, *Bellanca*, and *Iacobucci*] that the Twenty-first Amendment was a font of some sort of 'super authority' above and beyond the

considerable police powers retained by the States and which trumped the First Amendment when liquor regulation was at issue was clearly rejected in 44 *Liquormart.*" *J & B Social Club #1 v. City of Mobile,* 1996 U. S. Dist. LEXIS 15498 Oct. 2, 1996) (S. D. Ala.).

It is now clear that Georgia's ratification of a "mini-Twenty-first Amendment" to the state constitution provided the means by which the State delegated to local government its authority to regulate alcohol[7], but its passage does not affect the analysis to be given a statute or ordinance which allegedly impinges upon the constitutionally-guaranteed right of free speech and expression. Thus, application of our tripartite *Paramount Pictures* test or the First Amendment analytical framework from which it is derived remains appropriate for content-neutral legislation.[8]

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[7] The States may delegate the broad power given them by the Twenty-first Amendment "as they see fit." *City of Newport v. Iacobucci,* supra, 479 U. S. at 96. A State's failure to delegate its Twenty-first Amendment authority to local governments within the State has resulted in a local ordinance being found unconstitutional. See *Connor v. Town of Hilton Head Island,* 442 SE2d 608 (S.C. 1994). Cf. *Krueger v. City of Pensacola,* 759 F2d 851, 854 (11th Cir. 1985), where the 11th U. S. Circuit Court of Appeals held that Florida's failure to delegate its Twenty-First Amendment regulatory authority to local governments required the city to justify its ordinance under "[a] stricter standard typically used to review an infringement on a protected liberty interest justified solely under the government's police power."

[8] The *Paramount Pictures* three-pronged study of statutes and ordinances to determine whether the free expression guaranty of the Georgia Constitution has been violated is derived from the analytical framework applied by federal courts when measuring legislative enactments against the First

4. Marietta's ordinance amendment is "content-neutral" legislation if it is " ' "justified without reference to the content of the regulated speech." [Cit.]' " *Chambers v. Peach County,* supra, 266 Ga. at 319. When adult entertainment establishments are involved, the "regulated speech" is the constitutionally-protected expressive conduct of nude dancing. *Harris v. Entertainment Systems,* supra, 259 Ga. 701. The principal inquiry in determining whether a legislative act is content-neutral is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys. [Cit.] The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. [Cit]." *Ward v. Rock Against Racism,* 491 U. S. 781, 791 (109 SC 2746, 105 LE2d 661) (1989).[9] An ordinance designed to

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Amendment of the U. S. Constitution. *Paramount Pictures,* supra, 250 Ga. at 255, n. 5.

[9] As *Ward* makes clear, determining whether legislation is content-neutral depends upon the governing body's purpose in passing the legislation. Accordingly, the *content* of the legislation, i.e., the regulation of adult entertainment establishments, does not control whether the legislation is content-neutral. This court's statement in *Club Southern Burlesque v. City of Carrollton,* 265 Ga. 528 (1) (457 SE2d 816) (1995), rejecting the club's contention that the ordinance regulating adult entertainment establishments was not content-neutral, should not be read as a holding that *all* ordinances regulating adult entertainment establishments are content-neutral. As noted in *Club Southern,* the *Paramount Pictures* standard of review is used only when the questioned legislation is found to be content-neutral, and the use of the *Paramount Pictures* test in two earlier cases reviewing ordinances nearly

combat the undesirable secondary effects of sexually explicit businesses is content-neutral. *City of Renton v. Playtime Theatres,* 475 U. S. 41, 49 (106 SC 925, 89 LE2d 29) (1986); *Chambers v. Peach County,* supra, 266 Ga. at 319. See also *Harris v. Entertainment Systems,* supra, 259 Ga. at 703. Before enacting an ordinance to combat undesirable secondary effects, a legislative body is required to consider specific evidence of the undesirable secondary effects that it reasonably believes relevant to the problems it seeks to address by passing the ordinance. *Chambers v. Peach County,* supra, 266 Ga. at 321.

The preamble to the amending ordinance passed by the Marietta City Council stated that the city council's enactment of the amendment was based on the experiences of other urban counties and municipalities believed to be relevant to Marietta's problems, and a review of a Marietta police report concerning criminal activity around the three existing clubs offering adult entertainment and alcohol. The preamble also contained the city council's finding that "public nudity (either partial or total) under certain circumstances, particularly circumstances related to the sale and consumption of alcoholic beverages and so-called nude bars or establishments offering so-called nude entertainment or adult entertainment begets criminal activity and tends to create undesirable community conditions." The preamble listed as "undesirable community conditions identified with nudity and alcohol" the depression of property values in

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identical to the ordinance being reviewed in *Club Southern* led to the conclusion that the *Club Southern* ordinance was also content-neutral.

the surrounding neighborhood, the increased expenditure for law enforcement, the increased burden on the judicial system due to increased criminal behavior, and acceleration of community blight caused by the concentration of such establishments in particular areas. The transcript of the city council meeting at which the ordinance amendment was discussed and passed reflects that citizens and elected representatives voiced concern about property values and the need to close nude dancing establishments. The transcript also shows that council members considered studies from other cities which showed a correlation between the presence of adult entertainment and an increase in crime. The city's chief of police appeared at the council meeting and stated that the rate of calls for police service was slightly higher in the area surrounding the three licensees than at other establishments serving alcohol. He acknowledged that his statistics reflected calls for police service made from the areas studied, and that each call did not reflect the commission of a crime. In affidavits executed after the lawsuits at bar were filed, each of the council members who voted in favor of the ordinance amendment swore that he/she relied upon the testimony and evidence presented at the city council meeting at which the ordinance amendment was passed, including the studies from other cities. Each council member averred that the studies were "relevant to the City of Marietta, the problems faced by the City of Marietta and the problems addressed by the Ordinance."

Appellants Tudor and Cyprus Lounge assert that the trial court's finding, implicit in its application of the *Paramount Pictures* test, that the ordinance was content-neutral was erroneous in light of evidence that the mayor

and several council members expressed a desire in published reports to eliminate nude dancing establishments from Marietta. " '[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute' on the ground that 'a punitive purpose in fact lay behind the statute.' " *Ambassador Books & Video v. Little Rock,* 20 F3d 858, 863 (8th Cir. 1994), quoting *Fleming v. Nestor,* 363 U. S. 603, 617 (80 SC 1367, 4 LE2d 1435) (1960). Judicial inquiry into legislative motives or purposes is a "hazardous matter," for what motivates one legislator to make a comment about a law is not necessarily what motivates fellow legislators to enact the law. *United States v. O'Brien,* 391 U. S. 367, 383 (88 SC 1673, 20 LE2d 672) (1968). If it is established that the "predominate intent" of the enacted legislation was to combat or avoid pernicious secondary effects, then the legislation is deemed to be content-neutral. See *City of Renton v. Playtime Theatres,* supra, 475 U. S. at 48. With these standards in mind, we conclude that the evidence upon which appellants rely is insufficient as a matter of law to establish improper intent. *Ambassador Books & Video v. Little Rock,* supra, 20 F3d 858; *Colacurcio v. City of Kent,* 1996 U. S. Dist. LEXIS 16514 (W.D. Wash.) (Nov. 1, 1996). In light of the city council's predominate goal of combatting pernicious secondary effects and the lack of sufficient evidence to establish an improper motive on the part of council members, we conclude the ordinance is content-neutral.

5. Since the ordinance amendment was content-neutral, we apply the tripartite *Paramount Pictures* test to determine whether the restriction imposed on expression

passes constitutional muster: (1) Does the ordinance further an important governmental interest? (2) Is that interest unrelated to the suppression of speech? and (3) Is the legislation an incidental restriction of speech no greater than essential to further the important governmental interest? *Chambers v. Peach County,* supra, 266 Ga. at 319. As noted above, the stated purpose of the ordinance amendment was to control criminal behavior and prevent undesirable community conditions. A city has a substantial government interest in "attempting to preserve the quality of urban life. . . . " *City of Renton v. Playtime Theatres,* supra, 475 U. S. at 50. The "reduction of criminal activity and prevention of the deterioration of neighborhoods are important government interests. . . . " *Discotheque v. City Council of Augusta,* 264 Ga. 623, 624 (449 SE2d 608) (1994). The city substantiated its declaration that the amended ordinance was necessary to curb the unwanted secondary effects of mixing alcohol and adult entertainment through the experiences of other cities that the council members reasonably believed to be relevant to the problems faced by Marietta. The city's desire to preserve the quality of urban life and its attempt to reduce crime and prevent neighborhood deterioration by separating alcohol from adult entertainment are important government interests unrelated to the suppression of speech. Id. Finally, the ordinance's application is sufficiently narrowly tailored because it is limited to the modes of expression implicated in the production of negative secondary effects – those establishments that provide alcohol and entertainment requiring an adult entertainment license – thereby exempting mainstream performance houses, museums, or theaters. See *S.J.T., Inc.*

v. Richmond County, 263 Ga. 267 (3) (430 SE2d 726) (1993). Compare *Pel Asso, Inc. v. Joseph,* supra, 262 Ga. 904. We conclude that the ordinance satisfies the three-pronged *Paramount Pictures* test and affirm the trial court's conclusion that the ordinance is a proper exercise of the city's police power.

6. In light of the amended Marietta ordinance, none of the appellants received the appropriate licensing in 1996 to permit them to provide adult entertainment and alcohol at the same location.[10] Appellants contend they have a vested property right in the renewal of their adult entertainment and alcohol licenses which entitles them to due process of law and which prevents the city from enacting retrospective laws which adversely affect their ability to provide both liquor and adult entertainment. Under both the federal and state constitutions, one may not be deprived of life, liberty, or property by the government "without due process of law." U. S. Constitution, Amendment XIV; 1983 Ga. Const. Art. I, Sec. I, Par. I. The Georgia Constitution further prohibits the passage of retroactive laws (Art. I, Sec. I, Par. X), i.e., "laws which injuriously affect the vested rights of citizens." *Recycle &*

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[10] As set forth in fn. 2, the businesses continue to operate by means of an agreement among the parties. Consequently, appellants have not yet been denied a license under the amended ordinance since they have not applied for licenses after the effective date of the amended ordinance. We nonetheless address the issue because it is clear that, but for the parties' agreement, appellants would have applied for and would have been denied alcohol licenses, based on the amended ordinance, if they wished to continue operating as they have in the past.

Recover v. Bd. of Nat. Resources, 266 Ga. 253 (2) (466 SE2d 197) (1996).

Due process requires that any licensing scheme enacted pursuant to the police power "provide sufficient objective criteria to control the discretion of the governing authority and adequate notice to applicants of the criteria for issuance of a license." *Levendis v. Cobb County,* 242 Ga. 592 (1) (250 SE2d 460) (1978). Due process also requires that one to whom a license is denied, or one whose valid license is being revoked or suspended, be given notice and an opportunity to be heard. See *Rose v. Grow,* 210 Ga. 664 (3) (82 SE2d 222) (1954); *Levendis v. Cobb County,* supra, 242 Ga. 592. See also OCGA §§ 3-2-3 (1) and 3-3-2 (a), and Marietta City Code §§ 8-20-160; 8-20-200 et seq. Both the adult entertainment occupation tax certificate (i.e., the adult entertainment license) and liquor license issued to each appellant expire annually on the last day of the year, and a license holder "renews" the licenses by filing an application for a license each year. Marietta City Code, § 170. Thus, the statutory scheme puts each appellant in the position of an applicant on an annual basis. Since both state law and Marietta's ordinance provide an applicant with notice and an opportunity to be heard concerning the denial of an application, appellants will be afforded due process should their applications be denied.

7. In order to address appellants' contention that the 1995 amendment to Marietta's ordinance is an unconstitutional retrospective law, we must determine whether appellants have a vested property right in the renewal of their licenses because "[o]ur Constitution forbids passage of retroactive laws which injuriously affect the *vested*

rights of citizens. [Cits.]" emphasis supplied.) *Recycle & Recover,* supra, 266 Ga. at 254. See also *Bullard v. Holman,* 184 Ga. 788, 792 (193 SE 586) (1937) ("a State constitution broadly prohibiting the passage of retroactive laws is to be restricted as to apply only to enactments affecting or impairing vested rights."). Generally, laws enacted pursuant to the police power for the public's protection may be modified without violating a constitutional prohibition against retrospective statutes. *Hayes v. Howell,* 251 Ga. 580 (2) (b) (308 SE2d 170) (1983). However, even modifications to police power enactments cannot impinge upon vested rights. *Recycle & Recover,* supra, 266 Ga. at 254.

> "To be vested, in its accurate legal sense, a right must be complete and consummated, and one of which the person to whom it belongs cannot be divested without his consent. A divestible right is never, in a strict sense, a vested right." [Cit.]. It has also been said that: "the term 'vested rights,' which cannot be interfered with by retrospective laws, means interests which it is proper for the State to recognize and protect and of which the individual cannot be deprived arbitrarily without justice." [Cits.]

Hayes v. Howell, supra, 251 Ga. 580, 584. A property interest protected by the due process clauses of the federal and state constitutions meets our definition of "vested rights." Accordingly, if appellants have a property interest in the renewal of their licenses that is protected by due process, then they have a vested right which cannot be affected adversely by a retrospective law. However, before there can be a property interest in the *renewal* of a license, there must be a property interest in the license itself. Accordingly, we examine the issue of

whether appellants have a protectable property interest in their licenses.

8. In the past, the contention that one had a property right in a liquor license was summarily dismissed as without merit in light of the legislative declaration contained in OCGA § 3-3-1 that "[t]he businesses of . . . selling, handling, and otherwise dealing in or possessing alcoholic beverages are declared to be privileges in this state and not rights." See, e.g., *City of Mountain View v. Clayton County*, 242 Ga. 163 (249 SE2d 541) (1978); *Massell v. Leathers*, 229 Ga. 503 (192 SE2d 379) (1972); *Highnote v. Jones*, 198 Ga. 56 (31 SE2d 13) (1944). However, the "right/privilege" dichotomy is no longer availing since "relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.' " *Bell v. Burson*, 402 U. S. 535, 539 (91 SC 1586, 29 LE2d 90) (1971). See also *City of Atlanta v. Hill*, 238 Ga. 413, 414 (233 SE2d 193) (1977), where this court noted that "the death knell has been sounded to the right-privilege distinction."

Now, "[t]o have a property interest . . . , a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents v. Roth*, 408 U. S. 564, 577 (92 SC 2701, 33 LE2d 548) (1972). The Court in *Roth* pointed out that property interests do not spring forth from the U. S. Constitution, but are created and defined by statutes, rules, or understandings "that secure certain benefits and that support claims of entitlement to those benefits." Id., at 577. A license which entitles the holder to operate a business and the continued possession of which "may

become essential in the pursuit of a livelihood" is a protectable property interest under the Due Process Clause. *Bell v. Burson,* supra, 402 U. S. at 539. A law which provides that a license can be suspended or revoked only upon proof of certain contingencies "has engendered a clear expectation of continued enjoyment of [the] license absent proof of culpable conduct" and has thereby given the license holder a "legitimate 'claim of entitlement.' [Cit.]" *Barry v. Barchi,* 443 U. S. 55, 64, n. 11 (99 SC 2642, 61 LE2d 365) (1979). See also *Leone v. Town of New Shoreham,* 534 A2d 871 (R.I. 1987), where the Supreme Court of Rhode Island held that a license granted by government represented a property interest. Marietta's ordinance contains a list of grounds for the denial of an application for a liquor license (Marietta City Code § 8-8-2-130) and provides that a granted license is subject to revocation or suspension only upon the occurrence of specified events: conviction of a violation of the city code's liquor licensing provisions or any state or federal law, or revocation by the State of the license it issued for the manufacture or sale of alcoholic beverages. Marietta City Code § 8-8-2-220 (B) and (C). Since Marietta's city code sets forth the criteria which, if met, result in the issuance of a license, and specifies that a liquor license issued by the city can be suspended or revoked only upon a showing of cause, the city code created a protectable property interest in the license. *Barry v. Barchi,* supra, 443 U. S. at 64; *Richardson v. Town of Eastover,* 922 F2d 1152, 1156 (4th Cir. 1991). See also *Harris v. Entertainment Systems,* supra, 259 Ga. at 704, where this court, while expressly declining to determine the nature of the licensee's property interest, concluded that the licensee had a sufficient property

interest in the license to permit a court of equity to enjoin a criminal prosecution.[11]

9. Having determined that appellants have a vested right in the licenses issued them on an annual basis, we next consider whether each appellant has a vested right in continued re-issuance of its licenses. The same principle is applicable: the licensees must have more than a unilateral expectation that their licenses will be renewed year after year – they must have a legitimate claim of entitlement to license renewal (*Bd. of Regents v. Roth,* supra, 408 U. S. at 577) "based upon a state law, regulation, policy, or a mutually explicit understanding a governmental body puts forth. . . . " *Resolution Trust Corp. v. Town of Highland Beach,* 18 F3d 1536, 1544 (11th Cir. 1994). As stated earlier, state and local law expressly provide that issued liquor licenses expire at the end of the year and a licensee must apply annually to keep a license active. OCGA § 3-2-7; Marietta City Code § 8-2-2-200 (A). Adult entertainment occupation tax certificates issued by Marietta also have a lifespan of one year. City Code § 8-20-170. Faced with ordinances which expressly limit the duration of a license issued by Marietta, appellants assert they have a vested right to continue to offer adult entertainment and alcohol based on Marietta's past practice of annually issuing licenses to them.

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[11] In *Harris v. Entertainment Systems,* supra, 259 Ga. 701 (2), this court expressly noted that it made "no determination as to the nature of the property interest, only that it is sufficient to meet the [equity] exception set out in *Moultrie* [*Milk Shed v. City of Cairo*], 206 Ga. 348 [(1) (57 SE2d 199) (1950)]."

By relying on the City's practice of renewing licenses, appellants are contending that they and the city have "a mutually explicit understanding" that the City will allow appellants to continue to operate "as is." See *Perry v. Sindermann,* 408 U. S. 593 (92 SC 2694, 33 LE2d 570) (1972). While Marietta has, for several years, issued licenses which annually authorized appellants to offer both alcohol and adult entertainment for the calendar year covered by the licenses (see Footnote 1, supra), those licenses were of finite duration, and the city code expressly stated that the applicant for a liquor or an adult entertainment license had to meet annually the requirements for issuance set forth in the respective city code chapters. City Code §§ 8-8-2-130 (A) (10); 8-20-170. Compare *Cabo Distrib. Co. v. Brady,* 821 FSupp. 582, 597 (N. D. Cal. 1992), where the "certificate of label approval" was issued for "a potentially unlimited period of time. . . . " The annual issuance of the licenses could not create "a mutually explicit understanding" that licenses would annually be issued to appellants indefinitely, for nowhere does the city code provide that the licensing requirements will remain static. See *Triple A Svcs. v. Rice,* 545 NE2d 706 (Ill. 1989), where the Supreme Court of Illinois held that long and continued operation of their businesses did not vest mobile food vendors licensed by the City of Chicago with a property interest in the continuation of their business. See also *Ficarra v. Dept. of Regulatory Agencies,* 849 P2d 6 (Colo. 1993), where the Supreme Court of Colorado noted that one who holds a license that expires annually assumes the risk it may not be renewed. Compare City Code § 8-8-2-240 (A), which exempts the holder of a

Marietta liquor license from certain licensing requirements (residency, distance, location, parking, and type of building structure) so long as the licensee continues to remain in compliance with those requirements as they existed at the time the licensee initially received the liquor license.

> In organized society, every [person] holds all he possesses, and looks forward to all he hopes for, through the aid and under the protection of the laws; but as changes of circumstances and of public opinion, as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or less the value and stability of private possessions, and strengthen or destroy well-founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law, and many reasonable expectations, cannot be regarded as vested rights in any legal sense.

Cooley, Constitutional Limitations, pp. 746-747 (Vol. 2) (8th ed. 1927). The City Code makes it clear that the Marietta licensees before us do not have a vested right in the law never changing, and are not exempt from the exercise of the city's police power by its elected officials to further an important governmental interest. In light of the above, "the substantial reliance placed by [appellants] upon the renewal of their licenses, by constitutional standards, amounts only to 'a unilateral expectation,' *Roth*, [supra], 408 U. S. at 577 . . . " of renewal. *Ficarra v. Dept. of*

Regulatory Agencies, supra, 849 P2d at 20. Because appellants did not have a legitimate claim of entitlement to continued re-issuance of their annual licenses, they did not have a protectable property interest in their renewal. Compare *Bundo v. Walled Lake*, 238 NW2d 154 (Mich. 1976), and *Bosselman, Inc. v. State of Nebraska*, 432 NW2d 226) (Neb. 1988), where the Michigan and Nebraska supreme courts ruled that a licensee had a constitutionally-protected interest in obtaining a renewal of a liquor license.

10. Relying on *Clairmont Dev. Co. v. Morgan*, 222 Ga. 255 (149 SE2d 489) (1966), appellants claim they acquired vested rights to the continued re-issuance of alcohol and adult entertainment licenses for the same location because each of them spent substantial sums of money in reliance upon the initial issuance of the licenses. It is a tenet of zoning law that a property owner may acquire a vested right under a zoning ordinance which precludes retroactive application of zoning ordinances:

> "A landowner will be held to have acquired a vested right to continue the construction of a building or structure and to initiate and continue a use despite a restriction contained in an ordinance where, prior to the effective date of the ordinance, in reliance upon a permit theretofore validly issued, he has, in good faith, made a substantial change of position in relation to the land, made substantial expenditures, or has incurred substantial obligations." 3 Rathkopf, Law of Zoning and Planning, § 57-3. . . .

Barker v. County of Forsyth, 248 Ga. 73, 75-76 (281 SE2d 549) (1981). While we have acknowledged the existence of "constitutionally protected vested zoning rights" of a

property owner, under certain conditions, so as to preclude retroactive application of a *zoning* ordinance (e.g., *Corey Outdoor Advertising v. Bd. of Zoning Adjustments*, 254 Ga. 221 (4) (327 SE2d 178) (1985)), the same is not applicable to *licenses* to conduct a business. In *Cobb County v. Peavy*, 248 Ga. 870 (1) (a) (286 SE2d 732) (1982), this court distinguished between a business license and a building permit, holding that issuance of the latter, "a device for ensuring compliance with zoning ordinances" created a vested right in existing zoning ordinances, but that procurement of a business license, "typically not a device for ensuring compliance with zoning ordinances[,]" did not bestow vested rights upon the holder. We continue to adhere to the distinction and conclude that appellants' expenditure of funds in reliance upon the city's annual issuance of liquor and adult entertainment licenses to them did not endow them with a vested right to remain in business under the licensing regulations in existence at the time appellants received their initial licensing. Those who hold licenses that expire annually act at their peril and assume the risk that their licenses might not be renewed notwithstanding they have "committed their lives and their capital to building their businesses" which need licenses to operate. *Ficarra v. Dept. of Regulatory Agencies*, supra, 849 P2d at 18. Appellants must meet the requirements of the ordinance in effect at the time they file their annual applications for licenses. Cf. *Recycle & Recover*, supra, 266 Ga. at 255 (the filing of a "then-proper" application gives the applicant a vested right to issuance of the permit under the law as it existed at the time of the application).

11. Since appellants do not have a vested right to renewal of their licenses, their assertions concerning unconstitutional application of retrospective laws, unconstitutional impairment of contract, and an unconstitutional taking of property, all of which require the presence of a vested right/property interest, must fail.

12. The mayor and city council members are not individually liable as there is no evidence they acted oppressively, maliciously, corruptly or without authority of law so as to divest themselves of legislative immunity. OCGA §§ 36-66-4; 50-1-20.

13. In light of the above, appellant Cyprus Lounge is not entitled to a writ of mandamus requiring the City to issue to it adult entertainment and liquor licenses for the same location.

Judgment affirmed. All the Justices concur, except Sears, J., who dissents.

SEARS, Justice, dissenting.

In this appeal we are once again called upon to grapple with questions regarding the regulation of nude dancing. Although the majority implies in Division 10 that, because of the appellants' substantial expenditures in their businesses, they would have acquired vested rights if the City of Marietta had chosen to regulate adult entertainment by way of a zoning ordinance, the majority holds that the appellants acquired no right to continue their businesses since the city chose to regulate adult entertainment pursuant to a licensing scheme. I disagree with this holding and therefore dissent.

The majority relies largely on Division 1 (a) of *Cobb County v. Peavy*[12] for its holding. I find, however, that that division of *Peavy* is inapposite to this case. The contention addressed in Division 1 (a) of *Peavy* was whether the issuance of a business license in and of itself, without regard to the property owner's investment in the business, was sufficient to create a vested right. Here, of course, the issue is whether the appellants have acquired a vested right to operate their businesses because they obtained the appropriate licenses pursuant to the adult entertainment ordinance and because they made substantial expenditures to put the businesses into operation. Furthermore, although we held in *Peavy* the fact that the appellant had obtained a business license was not enough, by itself, to give her a vested right, we did not hold that this factor was dispositive of the appeal. Instead, we addressed whether Peavy had a vested right in her lawful, pre-existing use based upon the expenditures she had made.[13] *Peavy* thus implicitly stands for the proposition that a person operating a business can obtain a vested right based upon expenditures even if that person cannot acquire vested rights based upon the business license.

Moreover, I find no rational reason to treat *an adult entertainment ordinance like the one in this case* any differently from a zoning ordinance for purposes of determining vested rights. First, *Peavy* itself acknowledged that "the general aim of both zoning and licensing regulations is the promotion of the general welfare." Second, zoning

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[12] 248 Ga. 870, 872 (1) (a) (286 SE2d 732) (1982).

[13] *Peavy*, 248 Ga. at 872.

regulations, like licensing regulations, are subject to change at any time if the local government believes that the change will promote the general welfare of the community. Third, the adult entertainment ordinance in this case is in fact a combination zoning-licensing scheme, containing numerous traditional zoning features. Finally, here, unlike many licensing regulations, including the one at issue in the Colorado case on which the majority relies,[14] the adult entertainment ordinance was amended so as to entirely preclude the businesses that the appellants had been operating – lounges featuring nude dancing.

Because the adult entertainment ordinance at issue is a combination zoning-licensing scheme, because the ordinance's amendment precludes a pre-existing use of the property, and because zoning and licensing schemes share a common goal of furthering the general welfare of the public, I would apply to this case the well-established principle that the termination of a pre-existing use of property that does not constitute a nuisance and has not been abandoned generally is confiscatory unless there is a reasonable amortization period in which to bring the use to a close.[15] Under that test, I believe that the trial court

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[14] See *Ficarra v. Dept. of Regulatory Agencies*, 849 P2d 6 (Colo. 1993).

[15] 4 Ziegler, Rathkopf's The Law of Zoning and Planning, § 51.01[2][a] (4th ed.); 2 Ziegler at 17B.02 [3][I]; 4 Ziegler at 51B.05 [1]; *Ebel v. City of Corona*, 767 F2d 635, 639 (3) (9th Cir. 1985) (60-day amortization period for adult bookstore was found not to be satisfactory in view of length of lease and financial investment in bookstore).

erred in granting summary judgment to the appellees. I therefore dissent.

DECIDED MARCH 17, 1997 –
RECONSIDERATION DENIED APRIL 3, 1997.

Adult entertainment ordinance; constitutional question. Cobb Superior Court. Before Judge Bodiford.

O. Jackson Cook, Groover & Childs, Denmark Groover, Jr., for appellants (case no. S96A1494).

Steven M. Youngelson, for appellants (case no. S96A1496).

Alan I. Begner, Cory G. Begner, for appellants (case no. S96A1497).

Haynie & Litchfield, Douglas R. Haynie, Emilie K. Petrovich, Barnhart, O'Quinn & Williams, Michael A. O'Quinn, Robert K. Haderlein, for appellees.

Michael J. Bowers, Attorney General, Daniel M. Formby, Deputy Attorney General, John B. Ballard, Jr., Senior Assistant Attorney General, W. Wright Banks, Assistant Attorney General, amicus curiae.

APPENDIX 2

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

GOLD RUSH II, INC. and MUKESH SHRETTA, PLAINTIFFS, VS. CITY OF MARIETTA, GEORGIA, BETTY L. HUNTER, M.C. PETE WALDREP, JR., DANIEL O. COX, SR., E. PAUL SABISTON, JAMES C. DODD, AND FRANK T. AYERS, DEFENDANTS.	CIVIL ACTION FILE NO.: 9514269-33
VARSALONA'S ITALIAN RESTAURANT, INC., D/B/A BOOMER'S, A GEORGIA CORPORATION AND PATRICK VARSALONA, PLAINTIFFS, VS. THE CITY OF MARIETTA, GEORGIA, BETTY L. HUNTER, M.C. PETE WALDREP, JR., DANIEL O. COX, SR., E. PAUL SABISTON, JAMES C. DODD, AND FRANK T. AYERS, ALL IN THEIR INDIVIDUAL CAPACITY AS WELL AS CAPACITY AS	CIVIL ACTION FILE NO.: 95-1-5066-33

COUNCILPERSONS FOR THE CITY OF MARIETTA, AND PHILLIP GOLDSTEIN, IN HIS CAPACITY AS A COUNCILMAN ONLY, AND ANSLEY L. MEADERS, IN HER INDIVIDUAL CAPACITY AS WELL AS MAYOR OF THE CITY OF MARIETTA,

DEFENDANTS.

JAMES H. TUDOR, INDIVIDUALLY AND D/B/A CYPRUS LOUNGE,

PLAINTIFF,

V.

THE CITY OF MARIETTA, GEORGIA, BETTY L. HUNTER, M.C. PETE WALDREP, JR., DANIEL O. COX, SR., E. PAUL SABISTON, JAMES C. DOOD, AND FRANK T. AYERS, ALL IN THEIR INDIVIDUAL CAPACITY AS WELL AS CAPACITY AS COUNCILPERSONS FOR THE CITY OF MARIETTA, AND PHILLIP GOLDSTEIN, IN HIS CAPACITY AS A COUNCILMAN ONLY, AND ANSLEY L. MEADERS, IN HER INDIVIDUAL CAPACITY AS WELL AS MAYOR OF THE CITY OF MARIETTA,

DEFENDANTS.

CIVIL ACTION FILE NO.: 951710833

(Filed April 2, 1996)

ORDER

The above and foregoing matter came before the Court for a specially set hearing on the Defendants, Motion for Summary Judgment. After hearing extensive oral arguments and reviewing the record the Court finds as follows:

Procedural Background

On or about June 6, 1995, Gold Rush II, Inc. d/b/a Taj Mahal and Mukesh Shretta (hereinafter "Taj Mahal"), filed suit against the City of Marietta, Georgia, Betty L. Hunter, M.C. Pete Waldrep, Jr., Daniel O. Cox, Sr., E. Paul Sabiston, James C. Dodd, and Frank T. Ayers, Defendants (hereinafter collectively referred to as "Defendants", "City of Marietta", or "the City"). On or about July 6, 1995, Varsalona's Italian Restaurant Inc. d/b/a Boomer's and Patrick Varsalona (hereinafter "Boomer's"), filed suit against the Defendants, and on or about August 17, 1995, the Court consolidated the cases. Subsequently, on or about September 1, 1995, the Defendants filed their Motion for Summary Judgment.

Thereafter, on or about September 19, 1995, James H. Tudor, Individually and d/b/a Cyprus Lounge (hereinafter "Cyprus"), filed its suit against the Defendants, and agreed to consolidate same with the existing cases. Defendants filed an Amended Motion for Summary Judgment on or about October 20, 1995, and same was heard on December 8, 1995. All parties were represented at the specially set hearing and were given a period of ten hours to collectively present their cases. Following the hearing, on or about December 15, 1995, the parties entered into a

Consent Temporary Order whereby it was determined that the status quo would be maintained pending a resolution of the matters at issue from this Court and until the parties have exhausted all appeals through the Georgia Supreme Court level.

Factual Background and Legal History

On or about March 8, 1991, the City of Marietta enacted an ordinance dealing with adult entertainment specifically called Ordinance No. 4875. With respect to necessary licensing, the effect of the ordinance was that any establishment, the intention of which is to provide adult entertainment and serve alcohol, must obtain two seperate [sic] licenses for each purpose, both of which are required to be renewed on an annual basis.

According to the ordinance, any adult entertainment establishment must obtain an occupation tax certificate which "may be renewed on a calendar year basis provided that the applicants continue to meet the requirements set out in this chapter. The renewal fee for the adult entertainment establishments permit shall be established by resolution of the city council. Renewal applications shall be due by January 1st of the year for which such permit is requested." Marietta City Code 8-20-170.

Additionally, with respect to liquor licenses, the City's ordinance states in relevant part:

> (A) Duration and renewal of licenses under this chapter shall be as for business licenses generally; alcoholic beverage licenses renewals shall be due on or before November 15th of the year in which the license expires; and no

> licensee shall have any vested right to the renewal of any city license. . . . Marietta City Code 8-8-2-200.

On or about March 6, 1991, Boomer's opened for business, and maintained a liquor license and license for adult entertainment in accordance with the ordinance. On or about November 13, 1991, Cyprus applied for and obtained the necessary licenses to operate an adult entertainment establishment with the consumption of alcoholic beverages. In March of 1993, Taj Mahal applied for and obtained licenses to operate an adult entertainment establishment with the consumption of alcoholic beverages.

In 1994, the General Assembly proposed a constitutional amendment delegating the state's authority under the Twenty-First Amendment to municipalities and counties to regulate adult entertainment in connection with the sale of alcoholic beverages. The Constitutional Amendment, being Article III, Section VI, Paragraph VII, was placed on the ballot, and provides in pertinent part as follows:

> "Paragraph VII. **Regulation of alcoholic beverages.** The State of Georgia shall have full and complete authority to regulate alcoholic beverages and to regulate, restrict, or prohibit activities involving alcoholic beverages. This regulatory authority of the state shall include all such regulatory authority as is permitted to the states under the Twenty-First Amendment to the United States Constitution. This regulatory authority of the state is specifically delegated to the counties and municipalities of the state for

> the purpose of regulating, restricting, or prohibiting the exhibition of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages; and such delegated regulatory authority may be exercised by the adoption and enforcement of regulatory ordinances by the counties and municipalities of this state. A general law exercising such regulatory authority shall control over conflicting provisions of any local ordinance but shall not preempt any local ordinance provisions not in direct conflict with general law."

The Georgia voters approved the Amendment on November 8, 1994.

On or about January 19, 1995, the City of Marietta adopted an amendment to its Adult Entertainment Ordinance which effectively bans alcohol in adult entertainment establishments (hereinafter "the ordinance"). The ordinance amends Section 8-5032 of the Marietta City Code, and reads in pertinent part as follows:

> "(a) [n]o person, association, partnership or corporation licensed under Chapter 5 of Part 8 (8-5001 et seq.) of the Marietta City Code after the effective date of this ordinance shall serve, sell, distribute or suffer the consumption or possession of any intoxicating liquor, beer or wine or controlled substance upon the premises of any licensee. Any licensee whose license was granted prior to the adoption of this amendment shall not be subject to this amendment until December 31, 1995, at which time all licensees within the City of Marietta shall be subject to this provision, including those licensees licensed before the effective date hereof.

> (b) This section (8-5032) shall not apply nor prohibit the live performance of legitimate plays, operas, ballets at mainstream theaters, concerts halls, museums or educational institutions holding a license, which derive less than twenty (20%) of its gross receipts from the sale of alcoholic beverages."

The Ordinance, No. 5399 also states as follows:

> "(b) This ordinance is also adopted pursuant to the authority granted by Article III, Section VI, Paragraph VII of the Constitution of the State of Georgia.
>
> (c) This ordinance is further adopted to protect the public safety, health and welfare."

The reference to "Article III, Section VI, Paragraph VII" is to the aforementioned Amendment to the Georgia Constitution which was ratified by the voters on November 8, 1994 and became effective January 1, 1995. In effect, the Amendment to the Georgia Constitution delegated the State of Georgia's authority under the Twenty-First Amendment to the U.S. Constitution to counties and municipalities, and the City of Marietta's ordinance is the result of that delegation of power.

The City of Marietta takes the position that the stated purpose of the Ordinance is to eliminate the adverse effects of the sale of alcohol in adult entertainment establishments, same being increased criminal activity and decreased property values. The City contends that it relied on various studies from other areas in adopting the ordinance, and the Court will more fully discuss said studies in the remainder of this order.

By its own terms the Ordinance allowed the existing adult entertainment establishments, same being the Plaintiffs in this action, to keep their current licenses for the 1995 year. The Plaintiffs were licensed in 1995 to serve alcoholic beverages and offer adult entertainment, and such licenses expired on December 31, 1995. Upon the expiration of the 1995 licenses, the ordinance allowed the Plaintiffs to keep either their adult entertainment license or their liquor license, but not both. That denial resulted in the Plaintiffs instituting the subject litigation.

The Plaintiffs have brought suit for declaratory and injunctive relief seeking to prohibit the enforcement of the City of Marietta Ordinance. Cyprus also seeks the issuance of a mandamus to require Defendants to issue 1996 adult entertainment and alcoholic beverage licenses; and, similarly, Taj Mahal has filed an Application for Temporary Restraining Order and Preliminary Injunction, seeking an order restraining the City's enforcement of the ordinance. Although a variety of approaches are taken, the underlying argument presented by the Plaintiffs is the constitutionality of the Georgia constitutional amendment and the subsequent enactment of the ordinance by the Defendants.

Conclusions of Law

The ordinance adopted by the City of Marietta is the result of the amendment to the Georgia Constitution, and thus the Court will begin its analysis at the State level. Cyprus and the Taj Mahal are not challenging the enactment of the Constitutional amendment, but Boomer's

takes the position that the regulation of alcoholic beverages by the Constitutional amendment failed in two areas in that (1) the Amendment violates the first Amendment of the United States Constitution and the Constitution of the State of Georgia because it is fatally over broad, and (2) the Amendment was not limited to a single subject matter as required by the Georgia Constitution, nor did the ballot fairly apprise the voters of the substance of the amendment as required by the United States Constitution.

The Court finds that the evidence submitted in support of Defendants' Motion for Summary Judgment clearly showed that the Amendment to the Georgia Constitution was properly ratified by the electors of the State of Georgia and complied with all aspects of Article X, Section I, Paragraph II of the Georgia Constitution and statutory laws governing amendments to the Georgia Constitution. As presented by the Defendants, the two vital elements in any constitutional amendment are the assent of two-thirds of the Legislature and a majority of the popular vote. *Mayer v. Adams,* 182 Ga. 524, 186 S.E. 420 (1936). Although the other elements such as publication and ballot language are important, they are not themselves the essentials. *Mayer,* at 530.

Boomer's did not allege that the Amendment was not approved by two-thirds of the Legislature nor did Boomer's allege that the Amendment was not approved by a majority of the voters. Notwithstanding, the evidence clearly established that these elements were satisfied. The Court's review of the Roll Call Votes taken by the Georgia Senate and House of Representatives indicates that the requite number of votes existed. See

Exhibits F, G, H of Defendants' Motion for Summary Judgment.

The test for determining whether a constitutional amendment violates the multiple subject matter rule is whether all of the parts of a constitutional amendment are germane to the accomplishment of a single objective. *Carter v. Burson*, 230 Ga. 511, 519, 198 S.E.2d 151 (1973). The Court finds that the Amendment's single subject matter was the regulation of alcoholic beverages in adult entertainment establishments. Furthermore, the language of the Amendment was sufficient to enable to [sic] voters to ascertain the subject on which they were voting. *See Sears v. State*, 232 Ga. 547, 208 S.E.2d 93 (1974). The record shows that the Amendment was duly published in the Marietta Daily Journal, same being the Cobb County Legal Organ, during the weeks of October 17, 24, and 31, 1994. This is the method by which the voters inform themselves of the contents and merits of the proposed amendment. *Sears*, at 555.

The Court agrees with the Defendants that the Plaintiffs, remaining claims alleging that the Amendment is over broad and does not address retroactivity are without merit. The United States Supreme Court has ruled that invalidation of an ordinance on overbreadth grounds should only be applied "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). The Court finds that the Amendment to the Georgia Constitution furthered a substantial governmental interest and that the incidental restrictions on First Amendment freedoms were no greater than essential to further that interest. Therefore, the Court rejects any arguments

as to the invalidity of the amendment to the Georgia Constitution.

The Defendants are correct that as the Georgia Constitution now has the equivalent to the Twenty-First Amendment, analysis under the Twenty-First Amendment rather than the First Amendment is appropriate. *See City of Newport v. Iacobucci*, 479 U.S. 92 (1986); *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981). *Compare Harris v. Entertainment Sys. Inc.*, 259 Ga. 701, 386 S.E.2d 140 (1989). The Twenty-First Amendment to the United States Constitution provides that "[t]he transportation or importation into any State. . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, §2. With respect to the Twenty [sic] First Amendment to the United States Constitution, the United States District Court of Georgia has stated that the State's broad power under the Twenty [sic] First Amendment to ban entirely the sale of alcoholic beverages, which may be delegated as the state sees fit, includes the lesser power to ban the sale of liquor on premises where topless dancing occurs despite possible First Amendment implications. *Top Shelf v. Mayor & Alderman for Savannah*, 804 F.Supp. 903 (S.D. Ga. 1993).

Therefore, this Court must now determine the validity of the ordinance passed by the City of Marietta passed pursuant to the authority delegated by the amendment to the Georgia Constitution. Inasmuch as there have been no other ordinances passed by a local governing body subsequent to the passage of the constitutional amendment, the instant action presents a case for which there is no binding precedent. Thus, the Court will

look to decisions based on the law prior to the Constitutional amendment and those which specifically address the lack of such an amendment.

The test of the constitutionality of a local adult entertainment ordinance was established in the landmark case of *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252, 297 S.E.2d 250 (1982). The "*Paramount* test" states that an adult entertainment ordinance is deemed constitutional (1) if it furthers an important government interest; (2) if that government interest is unrelated to the suppression of speech; and (3) if the incidental restriction on speech is no greater than is essential to the furtherance of that government interest. *Paramount*, at 256. A carefully and narrowly drawn regulatory scheme which makes appropriate distinctions between public and private behavior and which impacts only those modes of expression which, in the experience of local governments, tend to be the focal points of negative effects such as increased crime, can pass constitutional muster notwithstanding some restriction of protested expression. *Gravely v Bacon*, 263 Ga. 203, 429 S.E.2d 663 (1993). In enacting an adult entertainment ordinance, a city may rely on evidence of pernicious secondary effects of adult entertainment establishments as found by studies commissioned by other municipalities and counties. *Club Southern Burlesque, Inc. v City of Carrollton*, 265 Ga. 528, 457 S.E.2d 816 (1995).

A critical factor in a trial court's decision in a case involving ordinances controlling adult entertainment and alcoholic beverages is the use of studies of adverse impacts considered by the governing body. In the case at bar Plaintiffs claim that there is insufficient evidence of pernicious secondary effects within the City of Marietta

and that the studies of other cities which the City considered are flawed.

The Defendants take the position that the ordinance was adopted after review and consideration by Defendants of specific evidence of the pernicious secondary effects of adult entertainment establishments licensed to sell alcohol for consumption on the premises. Specifically, the Defendants considered the studies of other cities which showed a correlation between adult entertainment and increased crime and lower property values. The Defendants reviewed the studies from six (6) other jurisdictions: Austin, Texas; Dallas, Texas; Houston, Texas; St. Paul, Minnesota; Minneapolis, Minnesota and Los Angeles, California.

Defendants also reviewed a 1991 Atlanta Business Chronicle article on the adult entertainment business in Atlanta, Georgia. In all, the Defendants contend that the total number of pages in said studies and other articles was 506 pages. The individual Defendants considered the evidence in the studies to be relevant to the City of Marietta, the problems faced by the City of Marietta and the problems addressed in the ordinance. See Affidavit of Frank T. Ayers, Affidavit of Paul Sabiston, Affidavit of Daniel (Dan) O. Cox, Sr., Affidavit of James C. Dodd, Jr., Affidavit of M.C. (Pete) Waldrep, Jr., and Affidavit of Betty Lou Hunter. After consideration of all the evidence, the Defendants voted six to one to pass the amendment to its Ordinance.

Notably, three of the studies reviewed by Defendants have been approved by the appellate courts. In *Parker v Whitfield County*, Case #S95A0655 (Georgia Supreme

Court, 11/6/95), the Court approved the Indianapolis study, and in *World Famous Dudley's Food and Spirits, Inc.*, 265 Ga. 618, 458 S.E.2d 823 (1995) the Court approved the Austin, Texas and Indianapolis study, and in *Centaur v Richland County, South Carolina*, 392 S.E.2d 165 (1990), the Supreme Court of South Carolina approved the Austin, Indianapolis and Los Angeles study. Also, in *Top Shelf*, supra, the District Court approved the Austin, Texas, Indianapolis and Los Angeles studies.

Defendants have filed with this Court the Affidavits of the Mayor and six (6) members of Council which state, among other things, that the Mayor and Members of Council were acting in good faith in the adoption of the Ordinance and were not acting oppressively, maliciously or corruptly. In addition, each Affidavit states that the Affiant relied upon the studies in the record and found that the studies were relevant to the problems faced by the City of Marietta. The Affidavits further state that the Mayor and Members of Council relied upon the advice of the City Attorney in adopting said Ordinance. See Affidavit of Frank T. Ayers, Affidavit of Paul Sabiston, Affidavit of Daniel (Dan) O. Cox, Sr., Affidavit of James C. Dodd, Jr., Affidavit of M.C. (Pete) Waldrep, Jr., and Affidavit of Betty Lou Hunter.

Plaintiffs filed a Motion to Strike the studies relied upon by Defendants claiming such are hearsay and not authenticated. However, the Georgia Supreme Court has determined that such studies are not hearsay because they do not rest on the veracity and competency of the studies themselves or their authors. Rather, the evidence derives its value solely from the credit of the City's representation that it had relied upon the named studies

and the relevance thereof. "The list of studies and the representation that those studies support the City's position were not offered to prove the truth of the matters asserted therein, but were offered to prove that the City had considered specific evidence of the pernicious secondary effects of adult entertainment establishments which it reasonably believed to be relevant to the problems addressed by the ordinance." *Club Southern,* at 530. It is not incumbent upon the City to prove the efficacy of the studies. To the contrary, the City is only required to prove that it considered specific evidence of the pernicious secondary effects of adult entertainment establishments which it reasonably believed to be relevant to the problems addressed by the ordinance. *Dudley's,* at 525, *Parker v Whitfield County,* supra.

In cases where an ordinance is ultimately struck down as being unconstitutional, the appellate courts have noted a failure by the governing body to consider studies. In a recent decision the Georgia Supreme Court turned its attention directly to the local government's effort to establish that its ordinance was passed to combat undesirable secondary effects of sexually explicit business. In *Chambers d/b/a "Neon Cowboy" v Peach County, Georgia,* Nos. S-95-A-1967 (3/4/96) the Supreme Court stated that in enacting an ordinance to combat the undesirable effects of adult entertainment establishments, a governing body is required to rely upon evidence reasonably believed to be relevant to the problem the government is addressing. *Chambers,* supra. The Court found that the Peach County ordinance's statement of purpose was not evidence of the undesirable secondary effects upon which the county could rely in enacting the ordinance and did

not show that, in enacting the ordinance, the county relied on evidence reasonably believed to be relevant to the problems of increased crime and neighborhood deterioration. "At the time a governing body seeks to regulate adult entertainment establishments, it must have evidence of a relationship between the proposed regulation and the undesirable secondary effects it seeks to control . . . In passing its regulation, a governing body may rely on the experience of other counties and municipalities to show the relationship." *Chambers*, supra.

Thus, although the City of Marietta's preamble to its ordinance states "[T]his ordinance is further adopted to protect the public safety, health and welfare. . . . " reliance on verbiage in an ordinance's preamble is not enough. Similarly, in an earlier case the Supreme Court of Georgia rejected as insufficient the City of Augusta' reliance on its preamble which stated the city had relied on the experience of other municipalities and counties as showing that criminal activity and deterioration of neighborhoods are secondary effects of adult entertainment establishments. *Discotheque v City Council of Augusta*, 264 Ga. 623, 449 S.E.2d 608 (1994). Therefore, it is clear that such a reliance will not carry the requisite burden to be met by a governing body in upholding the constitutionality of an ordinance regulating adult entertainment.

However, unlike the parties in *Discotheque* and *Chambers*, the City of Marietta did not rely solely on the statement in its preamble as to the purpose of the ordinance. The Defendants considered specific evidence of the pernicious secondary effects of adult entertainment establishments which it reasonably believed to be relevant to

the problems addressed by the ordinance. As stated previously, the Defendants relied upon the studies of the Cities of Austin, Texas; St. Paul, Minnesota; Minneapolis, Minnesota; Dallas, Texas; Houston, Texas; Los Angeles, California and an Article on Regulating Sex Businesses. The studies were distributed to members of Council for their review prior to the meeting and were read and considered by the members of Council. See Affidavit of Frank T. Ayers, Affidavit of Paul Sabiston, Affidavit of Daniel (Dan) O. Cox, Sr., Affidavit of James C. Dodd, Jr., Affidavit of M.C. (Pete) Waldrep, Jr., and Affidavit of Betty Lou Hunter.

Testimony from the Police Chief regarding the impact of crime at adult entertainment establishments was also considered by Council prior to their vote. The Defendants reasonably relied upon these studies and testimony. See Affidavit of Frank T. Ayers, Affidavit of Paul Sabiston, Affidavit of Daniel (Dan) O. Cox, Sr., Affidavit of James C. Dodd, Jr., Affidavit of M.C. (Pete) Waldrep, Jr., and Affidavit of Betty Lou Hunter.

The Court is cognizant of the fact that the City of Marietta did not perform independent investigations of its own. However, the Georgia Supreme Court has made clear that the efficacy of the studies which the Defendants did consider is not the focus, but rather the reliance of the city on the studies when adopting the ordinance. *Dudley's*, supra, *Parker*, supra. Therefore, with respect to the issue of the evidence considered in amending its ordinance the City has met the requisite burden.

Plaintiffs further argue that the ordinance violates free speech because it is content-based. Only a content-

neutral ordinance or statute is subject to the "Paramount test". *Club Southern,* supra. The Georgia Supreme Court has previously rejected the contention of Plaintiffs in this case. *See S.J.T., Inc. v. Richmond County, Georgia,* 263 Ga. 267, 430 S.E.2d 726 (1993); *Gravely v. Bacon,* 263 Ga. 203, 429 S.E.2d 663 (1993). An ordinance regulating adult entertainment establishments, such as the Ordinance in this case, is content-neutral. The Court finds that the Plaintiffs' claims to the contrary are without merit.

The language of the ordinance shows that the government interest is unrelated to the suppression of speech. Unlike the ordinance in *Harris v. Entertainment Sys.,* 259 Ga. 701, 386 S.E.2d 140 (1989), the ordinance here is narrowly drawn to further the Defendants' interest in preventing the negative effects associated with adult entertainment establishments offering nude dancing and alcohol.

> "A carefully and narrowly drawn regulatory scheme which makes appropriate distinctions between public and private behavior and which impacts only those modes of expression which, in the experience of local governments, tend to be the focal points of negative effects such as increased crime, can pass constitutional muster notwithstanding some restriction of protected expression."

Pel Assoc. v. Joseph, 262 Ga. 904, 907, 427 S.E.2d 264 (1993). *Accord S.J.T., Inc. v. Richmond County,* 263 Ga. 267, 430 S.E.2d 726, 728 (1993). The Court notes that the ordinance does state, "[T]his section (8-5032) shall not apply nor prohibit the live performance of legitimate plays, operas, ballets at mainstream theaters, concert halls, museums or

educational institutions holding a license which derives less than twenty percent (20%) of its gross receipts from the sale of alcoholic beverages." This same exception and the 20% restrictions were upheld by the Court in *S.J.T., Inc.*, supra.

The Court finds that, from the evidence considered by Defendants at the public hearing, the Defendants found the potential for crime and lower property values to be the motivating factor behind the enactment of the ordinance. Thus, the Defendants met their burden of satisfying the three-part "Paramount test", and the Court further finds that the ordinance is a proper exercise of the Defendants' police powers.

Although this Court's analysis has heretofore been based upon the "Paramount test", it is important to note that the "Paramount test" predates a constitutional amendment delegating Twenty First amendment powers to local governments. Previously, the Georgia courts held that although a state may have a certain amount of its police power restored to it under the Twenty First Amendment that would otherwise be limited under the First Amendment, the expression is still within the purview of the First Amendment. Therefore, it is still protected by Georgia's free expression guarantees. "Because Georgia ha[d] no constitutional equivalent to the Twenty First Amendment, the State's police power, though possibly not limited under the U.S. Constitution, is limited by Georgia's constitution." *Harris v Entertainment Sys., Inc.*, at 703.

Notwithstanding the ordinance's compliance with the "Paramount test", it is imperative that the Court

recognize the amendment to the Georgia Constitution. In its most recent opinion on the issue of adult entertainment the Georgia Supreme Court notes that, "[b]oth the federal and state constitutions offer protection to some forms of nude dancing, since it is 'expressive conduct within the outer perimeters of the First Amendment' " *Chambers*, supra. By way of a footnote however, the Court further explained "While the Twenty-first Amendment to the federal constitution sanctions infringement on expressive rights through state regulation of the sale of alcohol, the Georgia Constitution provided no equivalent police power when the ordinance in question was passed by the Peach County Board of Commissioners, or when enforcement proceedings were initiated in the trial court . . . A month after the county filed this suit, the voters of Georgia ratified a constitutional amendment which authorizes state regulation of the sale of alcohol, and delegates that authority to local government." *Chambers*, supra.

It is not disputed that the ordinance passed by the City of Marietta was done so pursuant to the constitutional amendment referenced by the Court in *Chambers*. Therefore, this Court, while having addressed the "Paramount test", finds the position of the City of Marietta is strengthened based on the existence of the Georgia amendment. The Defendants had the authority to regulate alcohol and this power also included the power to ban nude dancing in establishments that sell alcohol. Accordingly, based on the foregoing, the amendment to the Defendants' Adult Entertainment Ordinance is constitutional.

Plaintiffs argue that the City's ordinance is unconstitutional because it operates as a taking, impairs contractual obligations, and due process rights. In so doing, the Plaintiffs contend that their alcohol and adult entertainment licenses are protected property interests, and as such, can not be taken away without procedural due process.

Plaintiffs have asserted that the recent Georgia Supreme Court decision of *Recycle and Recover, Inc. v Georgia Board of Natural Resources,* Nos. S-95-A-1445 (1-22-96) bolsters their position. Said case involved a landfill operation. The Georgia Board of Natural Resources issued a permit to Recycle and Recover, Inc. for the construction of the landfill. Recycle then applied for a permit for a major modification, but, subsequent to the application the state legislature amended the applicable statute, O.C.G.A. 12-8-24, to prohibit any major modification of a landfill within three years from the beginning of operations. Therefore, the Georgia Board of Natural Resources denied the permit application.

On appeal Recycle argued that the Board's decision giving retroactive effect to the amended statute constituted an unconstitutional application. After determining that the passage of the amendment was an exercise of police power the Court explained, "[A]n enactment under the police power does not ordinarily violate any constitutional prohibition against retroactive statues [sic]. Nevertheless, our Constitution forbids passage of retroactive laws which injuriously affect the vested rights of citizens." *Recycle,* supra. The Court further defined vested rights as "interest which it is proper for (the) state to

recognize and protect and of which (the) individual cannot be deprived arbitrarily without injustice." *Recycle*, supra. The Court found that if a property owner becomes an actual applicant seeking to alter the use of his land, he has a vested right to consideration of his application under the statutory law then in existence, and held that the amendment could not have retroactive effect over Recycle.

The within case does not involve the Plaintiffs seeking to alter the use of their land. The within case involves two licenses, one for alcohol and one for adult entertainment, which are required to be renewed each year. The Plaintiffs' licenses expired on December 31st of each year. The amendment ordinance at issue was adopted on January 19, 1995, but had a delayed effected date as to the Plaintiffs of January 1, 1996.

Therefore, the Court agrees that the ordinance applied prospectively as to each of the Plaintiffs, and rejects the argument that same is being applied retroactively. The laws in effect on January 1, 1996, were Art. 3, Sec. 6, Para. 7 of the Georgia Constitution, same giving the City of Marietta the authority to regulate adult entertainment in connection with the sale or consumption of alcohol, and Section 8-503 of the Marietta City Code, same prohibiting the sale of consumption of alcohol at adult entertainment establishments. The Court finds that *Recycle* is consistent with the City's prospective application of the adult entertainment ordinance as effecting [sic] the Plaintiffs in this case.

Notwithstanding the *Recycle* opinion, the Court notes that there is not a constitutionally protected property

interest in a liquor license. *Top Shelf, Inc.* at 911. As explained above, Defendants did not deprive the Plaintiffs of their existing 1995 licenses. The Court has already rejected the Plaintiffs' contention that they have a vested property right to the *renewal* of their liquor licenses in the future. Moreover, the Georgia Supreme Court has found that there is no such property right under Georgia law. *Jackson v. The Three Aces Co., Inc.*, 249 Ga. 395, 291 S.E.2d 522 (1982).

In *Jackson*, the Supreme Court held that not even the expenditure of substantial funds ($40,000.00) upon a location which was not in compliance with the zoning code could authorize the issuance of a license. Furthermore, the Court held that the Twenty-First Amendment granted the State broad and sweeping authority to refuse a liquor license in conjunction with non-obscene adult entertainment. See also *City of Hampton v Briscoe*, 207 Ga. App. 501, 428 S.E.2d 411 (1993) in which the denial of the renewal of a business license in an improper zoning category was upheld because the applicant did not acquire any vested rights therein.

Plaintiffs have failed to demonstrate that they have a property interest or vested right and therefore, they cannot maintain a due process claim. Accordingly, Plaintiffs were not entitled to cross-examination at the public hearing. However, the Court notes that with respect to the due process given the Plaintiffs as to the adoption of the amended ordinance, the Court notes that the record shows that prior to the adoption of the amendment to the ordinance, Defendant posted notice twenty four hours in advance of the public hearing and notified the Plaintiffs personally of such meeting. Attorneys for the Plaintiffs

appeared in opposition to the ordinance. In total, eighteen people were allowed to testify before the City Council on both sides of the issue.

In effect, as no vested right has been proven, the Ordinance is not an impermissible ex post facto or retroactive law and therefore, there is no breach or impairment of contract. *See Keenen v. Hardison*, 245 Ga. 599, 266 S.E.2d 205 (1980). Furthermore, the Court in *S.J.T., Inc. v. Richmond County*, 263 Ga. 267, 430 S.E.2d 726, 730 (1993) rejected arguments similar to those made by Plaintiffs in this case. In *S.J.T.*, appellant argued that the ordinance denied them due process and unconstitutionality impaired their contracts by forcing them to derive income from sources other than by the sale of alcoholic beverages. The Court found that the licenses issued to appellant did not establish any vested right, contractual or otherwise, to both operate a bar and offer nude dancing. *S.J.T.* at 730.

The Court finds that the Plaintiffs' taking claim is also without merit. The Ordinance was enacted within the City's police power and is not a taking or damaging of property without just compensation. *See McCoy v. Sanders*, 113 Ga.App. 565, 148 S.E.2d 902 (1966); *Lewis v. Dekalb County*, 251 Ga. 100, 303 S.E.2d 112 (1983). There has been no "taking" as Plaintiffs have not been deprived of all viable economic uses of their property. *Rymer v. Douglas County*, 764 F.2d 796, 800 (11th Cir. 1985). The Plaintiffs are free to continue the operation of their business as adult entertainment establishments, without the consumption of alcohol by their patrons, or as bars or nightclubs, without the provision of adult entertainment for their patrons.

Plaintiffs further present the argument that the ordinance is a violation of equal protection and an unconstitutional prior restraint. The rational relationship test is employed to determine whether a city may differentiate under its Twenty-First Amendment powers. *Top Shelf,* supra. Under this standard, an enactment should be upheld if the disparity of treatment is rationally related to a legitimate government purpose. The governing body need not articulate the rationale but the classification may be upheld if "any reasonably conceivable state of facts" could support it. *Top Shelf,* supra.

Case law in the area is clear that a. city may regulate and classify adult entertainment establishments differently than other places of entertainment. *Gravely v. Bacon,* supra; *Parker v. Whitfield County,* supra. Where the purpose of the ordinance is to regulate alcohol in adult entertainment establishments, the Courts have rejected an equal protection challenge and found such to be a valid distinction. *See S.J.T.,* supra; *Pel Assoc.,* supra. Also, in *Top Shelf,* supra, the Court found that an ordinance similar to the one at issue in the case at bar to be rationally related to the legitimate governmental purposes of public health, safety and welfare. *Top Shelf,* at 909.

The evidence produced at the hearing showed that Defendants' ordinance was rationally related to the legitimate governmental purpose of (1) public health, safety and welfare; (2) crime prevention and (3) maintenance of property values and thus, the ordinance does not violate equal protection. The ordinance is not an unconstitutional prior restraint. This ordinance is analyzed under the Twenty-First Amendment in light of the Georgia Constitutional Amendment and is a proper exercise of that

authority. However, it is clear that under the "Paramount test", the licensing of adult entertainment establishments is not a per se violation of the First Amendment. *Club Southern* at 819.

Finally, Plaintiff, Boomer's challenges the 15 day waiting period in the ordinance. Boomer's asserts that the waiting period is a prior restraint in that it would require any independent contractor outside of the premises, as well as those working inside of the premises to be approved, and thus, said section is unconstitutional.

Section 8-20-100(b) of the ordinance provides, in part, as follows:

> "The City shall have 15 days to investigate the information required by the employee. If the employee is found to be of good moral character, the permitting officer shall grant approval of employment."

The Court finds that this 15 day waiting period in order to run a criminal background check on employees is constitutional. *See Southern Burlesque v. City of Carrollton*, 265 Ga. 528, 457 S.E.2d 816 (1995).

With respect to the City's ordinance and its application to the Plaintiffs, the Court finds in sum that same does not deprive Plaintiffs of all licenses or uses of their property. The Ordinance does however place a constitutional limitation on the licenses which Plaintiffs may receive. Each Plaintiff may, under the new Marietta City Ordinance, apply for and receive an adult entertainment license, if it so desires, provided it is not accompanied by an application for any type of alcohol license. Defendants are not required, under the terms of the Ordinance, to

issue both an alcoholic beverage and adult entertainment license. The choice remains with the Plaintiffs and all others similarly situated within the City of Marietta.

Plaintiffs are alleging that the individual Defendants are personally liable for their actions in voting on and approving the ordinance and are seeking sums in amounts in excess of $15,000,000 in damages. Plaintiffs claim that the individuals' actions were undertaken with improper motives and without authority of law. Plaintiffs assert a state and federal claim under Section 1983. Plaintiffs also claim that Defendants committed the tort of intentional infliction of economic harm. Defendants argue that they are entitled to absolute immunity. The Court agrees.

Plaintiffs rely on O.C.G.A. 36-33-4 which provides:

> "[m]embers of the council and other officers of a municipal corporation shall be personally liable to one who sustains special damages as the result of any official act of such officers if done oppressively, maliciously, corruptly, or without authority of law."

The Court finds that there is no evidence that the individual Defendants acted oppressively, maliciously, corruptly or without authority of law. The Defendants acted under the authority of the recent Georgia Constitutional Amendment and as previously set forth herein, Defendants met their burden of proving that they complied with the "Paramount test". Defendants did not violate clearly established statutory and constitutional rights.

The Ordinance enacted by the Defendants was constitutional, and the individual Defendants are entitled to

absolute legislative immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Healy v. Town of Pembroke Park*, 831 F.2d 989 (11th Cir. 1987). Alternatively, the Court finds that the individual Defendants are entitled to immunity under O.C.G.A. 51-1-20 which provides immunity from civil liability to persons serving with or without compensation as a member . . . of any local government agency, board, authority or entity . . . for any act or omission to act arising out of such service if such person was acting in good faith within the scope of his or her official actions and duties and unless damage or injury was caused by the willful or wanton misconduct of such person. O.C.G.A. 51-1-20. The Court finds that the individual defendants were acting in good faith within the scope of their official capacity, without willful or wanton misconduct. Therefore, this Court rejects any and all arguments that the individual Defendants are personally liable for their actions taken with respect to the passage of the amended ordinance.

Conclusion

In ruling on a motion for summary judgment, a court does not try the case but merely determines from the record whether there are any genuine issues of fact for determination by a jury. *Flanders v Columbia Nitrogen Corporation*, 135 Ga, [sic] App. 21, 217 S.E.2d 363 (1975). The purpose of summary judgment is to eliminate the necessity of trial where, giving the non-movant the benefit of all reasonable doubts and all favorable inferences that may be drawn, nevertheless the movant is entitled to a judgment as a matter of law. *Bowman v United States Life Insurance Co.*, 167 Ga.App. 673, 307 S.E.2d 134 (1983). "To

succeed on a motion for summary judgment, the movant must show that he or she is entitled to judgment as a matter of law." *Colquitt County Hospital v Health Star, Inc.*, 262 Ga. 285, 417 S.E.2d 147 (1992).

Based on the foregoing, this Court finds that the Defendants have met the requisite burden and hereby grants summary judgment as to Count One, Declaratory Judgment and declares that the Georgia Constitutional Amendment was properly ratified as a matter of law and that the Marietta Ordinance was properly enacted under the authority of the Georgia Constitutional Amendment and properly enacted under the "Paramount test". Plaintiff, Boomer's is not entitled to the refund of its business license fees as requested in Court [sic] Nine of its Complaint.

Plaintiff, Cyprus requested a mandamus to require Defendants to issue all licenses for 1996 to allow nude dancing and the consumption of alcohol on the premises. In light of the Court's findings that the ordinance is constitutional, this request is denied. Plaintiff does not have a clear legal entitlement to the remedy sought. Additionally, the Court finds that this request is moot in light of the Temporary Consent Agreement entered into by the parties which allows the Plaintiffs to remain open until a final resolution of the matter by the appropriate appellate courts. Summary Judgment is also granted as to Count Three of Cyprus's Section 1983 claim.

Plaintiff's Motion to Strike the studies considered and submitted by Defendants in support of their Motion for Summary Judgment is also denied. Plaintiff's request

for a temporary restraining order and permanent injunction is denied. Plaintiffs are not entitled to attorney's fees and punitive damages.

Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED that there is no genuine issue as to any material fact and that Defendants are entitled to summary judgment on all Counts as a matter of law.

Notwithstanding the above ruling, the Court reincorporates the Consent Temporary Order entered on or about December 15, 1995. Therefore, Taj Mahal, Boomer's and Cyprus can maintain the status quo and continue to operate and offer nude dancing and alcohol as they have presumably done pursuant to said Order from January 1, 1996, until the parties have exhausted all appeals through the Georgia Supreme Court level. The rest and remainder of the terms of said Order continue in full force and effect.

So ORDERED this 2nd day of April, 1996.

/s/ James G. Bodiford
JAMES G. BODIFORD, Judge
Superior Court of Cobb
Cobb Judicial Circuit

APPENDIX 3
AMENDMENTS TO THE CONSTITUTION.

[AMENDMENT I]

[*Freedom of Religion, of Speech, and of the Press*]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

APPENDIX 4

[AMENDMENT V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX 5

[AMENDMENT XIV]

Section 1.

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

[Apportionment of Representatives in Congress]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male

citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

[*Persons Disqualified from Holding Office*]

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

[*What Public Debts are Valid*]

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

[*Power to Enforce This Article*]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX 6

Code of Ordinances of the City of Marietta, Georgia

Section 8-5032

AN ORDINANCE

Findings; Public Purpose; Legal Authority. (a) Based upon the experience of other urban counties and municipalities, which experiences we believe are relevant to the problems faced by City of Marietta, Georgia, and based upon a review of a report from the Marietta City Police Department summarizing the criminal activity surrounding the three (3) existing license holders within the City of Marietta, we take note of the notorious and self-evident conditions attendant to the commercial exploitation of human sexuality, which do not vary greatly among generally comparable communities within our country. Moreover, it is the finding of the City Council of Marietta that public nudity (either partial or total) under certain circumstances, particularly circumstances related to the sale and consumption of alcoholic beverages in so-called "nude bars" or establishments offering so-called "nude entertainment" or "adult entertainment", begets criminal behavior and tends to create undesirable community conditions. Among the acts of criminal behavior identified with nudity and alcohol are disorderly conduct, prostitution, and drug trafficking and use. Among the undesirable community conditions identified with nudity and alcohol are depression of property values in the surrounding neighborhood, increased expenditure for the allocation of law enforcement personnel to preserve law and order, increased burden on the judicial system as a consequence of the criminal behavior hereinabove

described, and acceleration of community blight by the concentration of such establishments in particular areas. Therefore, the limitation of nude conduct in establishments licensed to sell alcohol for consumption on the premises is in the public welfare and it is a matter of governmental interest and concern to prevent the occurrence of criminal behavior and undesirable community conditions normally associated with establishments which serve alcohol and also allow and/or encourage nudity. To that end, this Ordinance is hereby adopted.

(b) This ordinance is also adopted pursuant to the authority granted by Article IX, Section II, Paragraph X of the Constitution of the State of Georgia.

BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF MARIETTA, GEORGIA, THAT:

Section 1. The Code of Marietta, Georgia, is hereby amended to add section 8-5032 which shall read as follows:

> "8-5032
> No person, association, partnership or corporation receiving an initial license under Chapter 5 of Part 8 of the Marietta City Code after January 11, 1995 shall serve, sell, distribute or suffer the consumption or possession of any intoxicating liquor or controlled substance upon the premises of any licensee. This section shall not apply to a renewal license which was initially granted before January 11, 1995 and which is renewed after January 11, 1995."

Section 2. It is hereby declared to be the intention of this Ordinance that its sections, paragraphs, sentences, clauses and phrases are severable, and if any section,

paragraph, sentence, clause or phrase of this Ordinance is declared to be unconstitutional or invalid, it shall not affect any of the remaining sections, paragraphs, sentences, clauses or phrases of this Ordinance.

Section 3. All Ordinances or parts of Ordinances in conflict with this Ordinance are hereby repealed.

Section 4. This Ordinance shall become effective upon the signature or without the signature of the Mayor, subject to Georgia laws 1983, page 4119.

DATE:_____ APPROVED:

ATTEST:

_____
ANSLEY LITTLE
MEADERS, Mayor

_____
SHEILA R. HILL,
City Clerk

APPROVED AS TO FORM:

_____
DOUGLAS R. HAYNIE,
CITY ATTORNEY

Supreme Court, U.S.
FILED
JUL 14 1997
CLERK

No. 96-1970

In The

Supreme Court of the United States

October Term, 1996

MUKESH SHRETTA AND GOLD RUSH II, INC. d/b/a CLUB TAJ MAHAL,

Petitioners,

vs.

THE CITY OF MARIETTA, GEORGIA, BETTY L. HUNTER, M.C. PETE WALDREP, JR., DANIEL O. COX, SR., E. PAUL SABISTON, JAMES C. DODD and FRANK T. AYERS,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

The Petitioners are Mukesh Shretta and Gold Rush II, Inc. d/b/a Club Taj Mahal as listed in the caption.

The Respondents are correctly identified in the caption. The Respondent City of Marietta has no parent or subsidiary companies. The City of Marietta is a political subdivision of the State of Georgia.

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The Respondents, City of Marietta *et al.* hereby oppose the petition of Petitioners, Mukesh Shretta and Gold Rush II, Inc. d/b/a Club Taj Mahal for a writ of certiorari to review the decision of the Georgia Supreme Court decided March 17, 1997, and request that the Court deny the petition for the reasons set forth below. The Georgia Supreme Court opinion is reported as *Goldrush II, Inc. v. City of Marietta*, 267 Ga. 683, 482 S.E. 2d 347 (Ga. 1997), *reconsideration denied*, April 3, 1997, *petition for cert. filed*, (U.S. June 12, 1997) (No. 96-1970). For the convenience of the Court, all citations to the opinion will be to the opinion attached as Appendix 1 of the petition.

The opinion of the Cobb County Superior Court filed April 2, 1996 is unreported and all references to that opinion will be to the opinion attached as Appendix 2 of the petition.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) over questions I, II and IV but cannot properly exercise jurisdiction over question III as it was not properly presented to the Georgia Supreme Court. *See* p. 18 below.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

This case is one of many in a long line of cases where the Georgia courts have been asked to review the regulation of nude dancing. Petitioners first filed this case in Cobb County Superior Court challenging an amendment to the City of Marietta's ("City") adult entertainment ordinance which prohibited alcohol in adult entertainment establishments. After an extensive hearing, the trial court granted summary judgment to the City, and Petitioners appealed the decision to the Georgia Supreme Court. In a 6-1

decision, the Georgia Supreme Court affirmed the grant of summary judgment by the trial court to the City of Marietta, the City Council and the Mayor, finding that the amendment was content-neutral and therefore, constitutional. Although the Georgia Supreme Court rejected the analysis of the trial court which relied on the Twenty-First Amendment[1] it held that such error was harmless in light of the trial court's reliance on Georgia's traditional First Amendment analysis set forth in *Paramount Pictures v. Busbee*, 250 Ga. 252, 297 S.E. 2d 250 (1982). After finding that the ordinance at issue was content-neutral based on the City of Marietta's goal of combatting pernicious secondary effects associated with adult entertainment establishments, the Georgia Supreme Court applied the *Paramount Pictures* three-prong test[2] to the facts of the instant case and held that the City's interest in reducing crime and preventing the deterioration of neighborhoods were important government interests; such interests were unrelated to the suppression of speech; and that the ordinance's application was sufficiently narrow to achieve such interests. Accordingly, the Court concluded that the ordinance was a proper exercise of the City's police powers.[3]

In reaching this conclusion, the Georgia Supreme Court applied

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1. "It is now clear that Georgia's ratification of a 'mini Twenty-First Amendment' to the state constitution provided the means by which the State delegated to local government its authority to regulate alcohol, but its passage does not affect the analysis to be given a statute or ordinance which allegedly impinges upon the constitutionally-guaranteed right of free speech and expression. Thus, application of our tripartite *Paramount Pictures* test or the First Amendment analytical framework from which it is derived remains appropriate for content-neutral legislation." Appendix 1 at 12.

2. The *Paramount Pictures* test is derived from the analytical framework applied by federal courts when measuring legislative enactments against the First Amendment of the United States Constitution. *See United States v. O'Brien*, 391 U.S 367 (1968).

3. *See 44 Liquormart v. Rhode Island*, 517 U.S. __, 116 S. Ct. 1495 (1996).

Georgia's longstanding First Amendment analysis.[4] The petition sets forth no compelling reason for this Court to review Georgia's free expression analysis as set forth in *Paramount Pictures*.

B. Correction of Misstatements in the Petition.

The Georgia Supreme Court opinion correctly sets forth the facts of this case and is attached to Petitioners' petition as Appendix 1. Petitioners' Statement of Facts are identical to those set forth in Petitioners' brief filed with the Georgia Supreme Court. Respondents point out the following factual discrepancies which Petitioners did not correct below:

Petitioners are incorrect in their statement that the Council for the City of Marietta considered *only* the studies and a report of the Chief of Police. Not only were ten (10) studies[5] detailing the

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4. *Harris v. Entertainment Sys. Inc.*, 259 Ga. 701, 386 S.E. 2d 140 (1989); *Yarbrough v. City of Carrollton*, 262 Ga. 444, 421 S.E. 2d 72 (1992); *Pel Assoc., Inc. v. Joseph*, 262 Ga. 904, 427 S.E. 2d 264 (1993); *Gravely v. Bacon*, 263 Ga. 203, 429 S.E. 2d 663 (1993); *S.J.T., Inc. v. Richmond County*, 263 Ga. 267, 430 S.E. 2d 726 (1993); *Discotheque, Inc. v. City Council of Augusta*, 264 Ga. 623, 449 S.E. 2d 608 (1994); *Quetgles v. City of Columbus*, 264 Ga. 708, 450 S.E. 2d 677 (1994); *Club Southern Burlesque, Inc. v. City of Carrollton*, 265 Ga. 528, 457 S.E. 2d 816 (1995); *World Famous Dudley's Food & Spirits, Inc. v. City of College Park*, 265 Ga. 618, 458 S.E. 2d 823 (1995); *Parker v. Whitfield County*, 265 Ga. 829, 463 S.E. 2d 116 (1995); *Chambers d/b/a "Neon Cowboy" v. Peach County*, 266 Ga. 318, 467 S.E. 2d 519 (1996); *Secret Desires Lingerie, Inc. v. City of Atlanta*, 470 S.E. 2d 879 (1996).

5. The studies reviewed by the Mayor and the Marietta City Council prior to the adoption of the ordinance at issue included those from the cities of Austin, Texas; Dallas, Texas; Houston, Texas; St. Paul, Minnesota; Minneapolis, Minnesota; Indianapolis, Indiana; and Los Angeles, California. The trial court noted that three of the studies reviewed by the City had previously been approved by the appellate courts. (*See* Appendix 2 at 44-45). In addition to the studies, the Council also reviewed a 1991 Atlanta Business Chronicle article on the adult entertainment business in Atlanta, Georgia.

pernicious secondary effects of the sale of alcohol in adult entertainment establishments and consisting of a total of five hundred and six (506) pages placed in the record, but eighteen (18) persons testified before the Marietta City Council on both sides of the issue. Specifically, four lawyers representing the adult entertainment clubs testified. The owner of a "juice bar" which offers nude dancing without the sale of alcohol testified that a "juice bar" was an economically viable venture. An expert real estate appraiser testified that property values surrounding the adult entertainment establishments had declined. The Chief of Police not only presented his report but testified at length regarding the issue of crime.

The hearing lasted approximately four (4) hours and the transcript of the public hearing is one hundred and seventy four (174) pages in length. After consideration of all testimony and evidence, Respondents voted six to one to amend its ordinance. Each member of council testified under oath in deposition that they had read and considered each study. Additionally, many of the members of council testified that they had attended meetings of the Georgia Municipal Association and/or the National League of Cities at which the pernicious secondary effects of the sale of alcohol at nude dance clubs had been discussed, reviewed and studied. It is apparent from the evidence that the Respondents considered *specific* evidence of the pernicious secondary effects of adult entertainment establishments and that the six members of the council reasonably believed the studies to be relevant to the problems addressed by the ordinance.

Pursuant to United States Supreme Court Rule 15.1, Respondents also bring the following misstatements of facts contained in the petition to the Court's attention:

The copy of the ordinance attached as Appendix 6 to the petition is not the ordinance passed by the City of Marietta and at

issue in this case. It cannot be claimed that the ordinance was misprinted as it differs substantially from the ordinance in the record before the trial court and the Georgia Supreme Court. Specifically, the ordinance attached to the petition omits two full sections, adds a sentence not contained in the ordinance passed by the Marietta City Council, and contains an incorrect reference to the Georgia Constitutional Amendment adopting the Twenty-First Amendment to the United States Constitution. The reference to the Georgia Constitutional Amendment does not even exist in the ordinance. Accordingly, Petitioners have misled this Court, either intentionally or unintentionally, and the petition should be denied for this reason alone. The Court cannot review the questions presented based on an ordinance never presented to the trial court or the Georgia Supreme Court.

For the record, a true and correct copy of the ordinance at issue in this case as adopted by the Marietta City Council is attached as Appendix A to this Opposition Brief. The correct ordinance contains all of the provisions of the ordinance including subparagraph (c) regarding the police power and a correct reference in subparagraph (b) to the appropriate section of the Georgia Constitution. The ordinance includes the correct licensing restriction as well as the saving clause for mainstream opera houses which are deleted from the ordinance submitted by Petitioners.

REASONS FOR DENYING THE WRIT

This is a case applying Georgia's free expression analysis as set forth in the case of *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252, 297 S.E. 2d 250 (1982). This case has been correctly analyzed and decided by the Georgia Supreme Court and prior to that by the Cobb County Superior Court. Therefore, two courts have reviewed the facts of the case and found the amendment to the City's adult entertainment ordinance to be constitutional. The petition for writ of certiorari does not identify any legal issue warranting further review.

I.

A DISTINCTION BETWEEN ZONING ORDINANCES AND LICENSING ORDINANCES DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AND THEREFORE, THERE IS NO FEDERAL QUESTION TO BE CONSIDERED BY THIS COURT.

Petitioners are correct in pointing out that the test to be utilized in analyzing an equal protection claim is that reaffirmed by this Court in *Romer v. Evans*, __ U.S. __, 116 S. Ct. 1620, 1627 (1996) that distinctions made by state governments must "bear a rational relation to some legitimate end". This is identical to the analysis adopted by the Georgia courts which is referred to as the "rational basis test". "Under this test, the court will uphold the statute if, under any conceivable set of facts, the classification bears a rational relationship to a legitimate end of government not prohibited by the [C]onstitution." *Union City Bd. of Zoning v. Just Outdoor*, 266 Ga. 393, 467 S.E. 2d 875 (1996), *quoting Craven v. Lowndes County Hosp. Authority*, 263 Ga. 657, 659, 437 S.E. 2d 308 (1993). If social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude. *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

Applying this analysis, the Georgia Supreme Court has stated that:

> [an] . . . ordinance does not offend the equal protection clauses of the State and Federal Constitutions if "it has some fair and substantial relation to the object of the legislation and furnishes a legitimate ground of differentiation."

Parking Ass'n v. City of Atlanta, Ga., 264 Ga. 764, 450 S.E. 2d 200 (1994).

> If the validity of the legislative classification . . . [is] fairly debatable, the legislative judgment must be allowed to control.

Id. at 203, *quoting Dekalb County v. Chamblee Dunwoody Hotel Partnership*, 248 Ga. 186, 190, 281 S.E. 2d 525 (1981); *See also Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

> The Fourteenth Amendment permits states wide discretion in enacting laws which affect some groups of citizens differently than others, the due process or equal protection safeguards contained therein being offended only if the resultant classifications or deprivations of liberty rest on grounds wholly irrelevant to a reasonable state objective. [Cit.] Therefore, unless a statutory classification is arbitrary, or not founded on any substantial distinction suggesting the necessity or propriety of such legislation, the courts have no right to interfere with the exercise of legislative discretion. . . . [Cit.]

Dixon v. City of Perry, 262 Ga. 212, 416 S.E. 2d 279 (1992); *Foster v. Ga. Bd. of Chiropractic Exam.*, 257 Ga. 409(14), 359 S.E. 2d 877 (1987).

Furthermore, it is not required that the distinction be perfect or the best one, and the courts do not focus on the fairness of the State law. *Love v. Whirlpool Corp.*, 264 Ga. 701, 449 S.E. 2d 602 (1994); *Bowman v. Knight*, 263 Ga. 222, 430 S.E. 2d 582 (1993). The distinction will be upheld if it is rationally related to a legitimate State interest. *Love* at 606.

Applying this analysis to the case at hand, it is clear that the distinction between zoning and licensing bears a rational relation to the object to be accomplished. The court explained the reason behind the distinction in *Cobb County v. Peavy*, 248 Ga. 870, 286 S.E. 2d 732 (1982) as follows:

> Although the general aim of both zoning and licensing regulations is the promotion of the general welfare, each is independent of each other and seeks to accomplish its purpose by different means. The fact that a zoning ordinance permits a use in a particular district does not authorize the use there without a license. On the other hand, a license or permit does not authorize a use in violation of the zoning laws. In other words, a license or permit does not relieve one from complying with a zoning ordinance, and this generally is true of astate license or permit.

Id. at 734, *quoting* 8 McQuillan, Municipal Corporations, § 25.12.

Relying on this distinction, the court in *Peavy* concluded that the issuance of a building permit or a substantial change in position by expenditures upon the probability of the issuance of a building permit[6] will create a vested right under existing zoning ordinances but the issuance of a business license[7] does not bestow vested rights. *See also Barker v. County of Forsyth*, 248 Ga. 73, 76, 281 S.E. 2d 549 (1981).

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6. The court in *Peavy* defined "building permit" as an official certificate that the proposed structure and use are in conformity with all zoning regulations.

7. A "business license" is contrasted with a zoning permit and typically not a device for ensuring compliance with zoning ordinances.

In this case, the distinction between zoning and licensing is applied to all persons similarly situated and not just to Petitioners. Although Petitioners may disagree with the distinction made by the Georgia courts, its petition fails to present any evidence that the underlying purpose of the distinction as set forth by the court in *Peavy* was irrational or that the means of effecting that purpose were chosen arbitrarily or capriciously. Failure to meet the burden of proving that a distinction is irrational or arbitrary is fatal. It was for this reason that the court rejected plaintiff's equal protection challenge in *Dixon v. City of Perry*, 262 Ga. 212, 416 S.E. 2d 279 (1992). In rejecting the claim, the court found that the City established a facially valid purpose and that the plaintiff did not carry his burden of controverting the reasonableness of the ordinance. The court concluded:

> If any reasonable state of facts can be conceived that would sustain the classification, existence of that state of facts at the time the law was enacted must be assumed, and one who assails such law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Id. at 280.

For the same reason, Petitioners equal protection challenge must fail here.

Petitioners' only claim is that the distinction between zoning and licensing has a chilling effect on protected speech.[8] However,

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8. It is recognized that nude dancing is considered "expressive conduct" within the outer perimeters of the First Amendment. *Barnes v. Glen Theatre*, 501 U.S. 560 (1991). This is not to say that such expressive conduct may not be restricted or regulated in any way. *Chambers d/b/a "Neon Cowboy" v. Peach County*, 467 S.E. 2d 519, 521 (Ga. 1996).

the evidence clearly contradicts this statement. The ordinance, and the distinction made by the Georgia Supreme Court, are not directed at speech or expression but merely at a type of conduct. The City met its burden of showing that the purpose of the ordinance was the prevention of crime and not to restrict adult entertainment. In fact, the application of the amendment does not prohibit nude dancing but simply prohibits the consumption of alcohol to occur simultaneously with adult entertainment.

As pointed out by the concurring opinion in *Ranch House, Inc. v. City of Anniston*, 678 So. 2d 745 (Ala. 1996), this type of ordinance only restricts the activities of the spectators and not the dancers' freedom of expression. *Id.* at 747. In that case, the City of Anniston enacted an ordinance almost identical to the City of Marietta which prohibited the consumption of alcohol in connection with the presentation of nude dancing. The Alabama Supreme Court upheld the ordinance finding that it was a valid exercise of the state's police powers and did not violate the State Constitution.

Petitioners also claims that the holding of the Georgia Supreme Court in the case of *Recycle and Recover, Inc. v. Georgia Board of Natural Resources*, 266 Ga. 253, 466 S.E. 2d 197 (1996) is inconsistent with the court's holding in this case. However, the facts of *Recycle* are distinguishable from those of this case.

In *Recycle*, the Georgia Board of Natural Resources issued a permit to plaintiff for construction of a landfill. Plaintiff then applied for a permit for a major modification, but *after* the application was filed, the state legislature amended the statute to prohibit any major modification within a three year period from the commencement of operations. The permit application was denied. The Georgia Supreme Court held that the denial was improper finding that a property owner has a vested right to consideration of his application under the statutory laws in existence at the time the application is

filed and the amendment passed by the legislature could not be applied retroactively.

In this case, the facts are entirely different. Here, the City amended its adult entertainment ordinance in January 1995 but delayed its effective date as to the three existing clubs until January 1996. The Petitioners' current licenses were not in any way affected by the amendment. The Petitioners did not have an application pending at the time the ordinance was amended like the plaintiff in *Recycle*. The permit issued to the plaintiff in *Recycle* had not expired at the time the application for modifications had expired. Petitioners in this case have continually ignored and refused to acknowledge the undisputed fact that their licenses expired on December 31st of each year.[9] Therefore, when Petitioners' applications for renewal were due in January of 1996, the law in effect was the City's amendment to the statute. In other words, the principle established by the Georgia Supreme Court in *Recycle* that an application be considered under the laws in existence *at the time the application is filed* was applied to the Petitioners. Accordingly, the opinion in *Recycle* is consistent with the City's prospective application of the adult entertainment ordinance. The City did not apply the amendment retroactively as found in *Recycle*.

Petitioners also fail to recognize that the reason that they have a vested right in the use of their property under zoning principles is because a zoning permit is issued for a perpetual duration. It is not issued on an annual basis and Petitioners do not have to reapply for zoning approval every year. The zoning permit does not on its face state an expiration date. On the other hand, the alcohol license and adult entertainment license issued to Petitioners clearly stated on the face of the license that it expired on December 31st,[10] and

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9. *See* Section 8-4-140 of the Marietta City Code.

10. A copy of Petitioners' 1995 beer/wine license is attached as Appendix B.

Petitioners were aware that they must annually apply for both licenses. The State Code also imposes the same requirements of annual renewal for a liquor license.[11]

Petitioners are correct when they state that the issue is not merely a nude dancing issue. The requirement that a business obtain an annual license is applied to every business and not just to Petitioners. This demonstrates that Petitioners' equal protection rights were not violated.

II.

THE GEORGIA SUPREME COURT HAS CORRECTLY AND CONSISTENTLY APPLIED THE HOLDING OF THIS COURT SET FORTH IN *CITY OF RENTON v. PLAYTIME THEATERS, INC.* AND THERE IS NO MERIT TO PETITIONER'S ARGUMENT THAT THE RESPONDENTS WERE REQUIRED TO UNDERTAKE A STUDY OF THE ADULT ENTERTAINMENT ESTABLISHMENTS IN THIS CASE.

Petitioners accuse the Georgia judiciary of misconstruing *City of Renton v. Playtime Theaters, Inc.* since this Court's decision over twelve years ago. In that landmark case, this Court established the yardstick by which hundreds of adult entertainment ordinances have been measured. The Court held:

> The First Amendment does not require a city, before enacting an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long

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11. O.C.G.A. § 3-2-7 provides that all licenses shall expire on December 31 of each year and an application for renewal shall be made annually on or before November 1. *See* Appendix D.

> as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

457 U.S. at 51.

Contrary to Petitioners' contentions, this Court did not qualify that opinion by requiring the studies which are considered to be in close proximity to the city in which the business is located nor did this Court require that the studies be conducted within a two, five or ten year period prior to the adoption of a municipal regulation. Rather, the Court simply required that a city consider *specific* evidence of pernicious secondary effects and that the city reasonably believe such to be relevant to the problems addressed by the city. In *Barnes v. Glen Theatre*, 501 U.S. 560 (1991), Justice Souter's opinion expressly rejects a requirement of affirmative evidence of secondary effects. Justice Souter observed:

> In light of Renton's recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, the State of Indiana could reasonably conclude that forbidding nude entertainment at the Kitty Kat Lounge and the Glen Theatre's "bookstore" furthers its interest in preventing prostitution, sexual assault, and associated crimes . . . I do not believe that a State is required affirmatively to undertake to litigate this issue repeatedly in every case.

Id. 501 U.S. at 584-85.

The Georgia Supreme Court adopted the holding of *City of Renton* in its analysis and explained:

> It was not incumbent upon the city to prove the efficacy of the studies. To the contrary, the city was only required to prove that it considered "specific evidence of pernicious secondary effects of adult entertainment establishments which it reasonably believed to be relevant to the problems addressed by the ordinance."

Dudley's Food & Spirits v. College Park, 265 Ga. 618, 458 S.E. 2d 823 (1995), *citing Club Southern Burlesque v. City of Carrollton*, 265 Ga. 528, 457 S.E. 2d 816 (1995).

The Petitioners in this case correctly acknowledge that the burden was on the City of Marietta to prove that it reasonably believed the studies to be relevant to the issues faced by the City of Marietta, and as both the trial court and Georgia Supreme Court noted, the City carried this burden.[12]

In reviewing the effect of this Court's holding in *City of Renton*, it is clear that it has become the basis for almost all ordinances regulating adult entertainment. Numerous other courts applying the test set forth in *City of Renton* have applied its holding in exactly the same manner as the Georgia Supreme Court. In *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir.), *cert. denied*, __ U.S. __, 115 S. Ct. 578, 130 L. Ed. 2d 493 (1994), the owner of an adult bookstore argued that the city was unreasonable in relying upon other cities' studies since such studies did not specifically address businesses similar to his business. The Eighth Circuit rejected this argument finding that the city relied on studies found relevant to the problems faced by the city and "measured adverse secondary effects linked to adult businesses

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12. The opinion of the Georgia Supreme Court sets forth in detail the measures the City of Marietta took prior to the adoption of the ordinance as well as the specific evidence considered by the City. (Appendix 1 at 14-15).

generally-higher crime, neighborhood deterioration, lower property values, and an increase in transients . . ." *Id.* at 1417 (emphasis added). The Eighth Circuit concluded that:

> [u]nder *City of Renton*, Rochester need not prove that Downtown Book and Video would likely have the exact same adverse effects on its surroundings as the adult businesses studied by Indianapolis, St. Paul, and Phoenix. So long as Ordinance No. 2590 affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects, Rochester "must be allowed a reasonably opportunity to experiment with solutions to admittedly serious problems."

Id. at 1418, *quoting Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion).

Two years later, the owner of an adult business attempted to utilize the same argument before the Court of Appeals of Minnesota and it was again rejected. In *City of Ramsey v. Holmberg*, 548 N.W. 2d 302 (Minn. App. 1996), *cert. denied*, __ U.S. __ (1997), the Court of Appeals cited *ILQ Investments v. City of Rochester* and concluded that the city's reliance on voluminous studies, reports and reference materials satisfies the *City of Renton* test and found that the city had sufficient information about adult businesses in general to enact a valid ordinance. *See also Mitchell v. Com'rs of Com'n on Adult Ent. Est.*, 10 F.3d 123, 133 (3rd Cir. 1993) {Under *Renton*, a city or state may rely heavily on the experience of, and studies produced by, other cities and states, as well as on court opinions from other jurisdictions.}

In support of their argument, Petitioners contend that there

have been no pernicious secondary effects connected with the operation of the three nude dance clubs in the City of Marietta. The City enacted the ordinance after consideration of numerous studies detailing the problems faced by other cities in connection with nude dancing and reasonably believed at the time the ordinance was passed that such studies were relevant to the problems faced by the City of Marietta. *See* Appendix E — Affidavit of Council Member. In retrospect, this belief has proved entirely reasonable and reinforces this Court's wisdom in the principle established by *City of Renton* that a city may rely on the experience of other cities in enacting its ordinances. That is because it has been shown that the experiences faced by other cities can happen anywhere.[13] In this case, on July 19, 1996, a patron entered the Cyprus Lounge,[14] an adult entertainment establishment within the city limits, and consumed alcoholic beverages for several hours while viewing nude dancing. The patron then got in his vehicle and left the Cyprus Lounge in a very intoxicated state. Shortly after leaving the Cyprus Lounge, the patron was involved in a collision with another vehicle in which he seriously injured the driver and killed the driver's wife of 63 years. The patron entered a guilty plea to the charges and is currently serving his sentence as a result of the above incident.[15]

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13. The Fourth Circuit observed in *11126 Baltimore Blvd. v. Prince George's County, Md.*, 886 F.2d 1415 (4th Cir. 1989), *vacated on other grounds*, 496 U.S. 901 (1990) that: "we find it reasonable for local legislative bodies to take notice or assume matters of common knowledge and experience. As countless cases addressed by this court and courts across the nation will confirm, there are notorious and self-evident conditions attendant to the commercial exploitation of human sexuality which do not vary greatly among generally comparable communities . . ." *Id.* at 1423.

14. Cyprus Lounge was an appellant in the case below and one of three consolidated in the Superior Court of Cobb County and decided in consolidated appeals by the Georgia Supreme Court.

15. A wrongful death suit has been filed by the family against the patron and the Cyprus Lounge. Paragraph Seven (7) of the Complaint states:

(Cont'd)

Although the above incident occurred after the adoption of the ordinance by the City of Marietta[16], it is solid proof that the pernicious secondary effects of the sale of alcohol in connection with adult entertainment results in increased crime and in this case, the unfortunate death of an elderly lady.

In fact, the above incident supports the 506 pages of studies, the testimony of the Chief of Police, the Atlanta Business Chronicle article, the 18 witnesses who testified before Council, and the material distributed to Council members at annual municipal meetings, all of which were considered by the Council prior to the adoption of the ordinance. The City is not required to wait until something tragic happens to enact an ordinance regulating the sale of alcohol and adult entertainment. The City wisely relied upon the studies of other communities in proactively passing an ordinance which separates alcohol and adult entertainment. The incident which then occurred after the passage of the ordinance shows that it was the right decision.

The cases relied upon by Petitioners are inapposite as the courts

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(Cont'd)

"[a]fter consuming numerous other alcoholic beverages, Defendant Adamson was induced to purchase and consume one of the aforementioned 'shooters' by a waitress/employee of The Cyprus Lounge who held a vial containing a 'shooter' between her bare breasts and poured it into Defendant Adamson's mouth."

16. Although supplemental materials cannot sustain regulations where there is no evidence of secondary effects in the pre-enactment legislative record, it can be considered to supplement a record of evidence of pernicious secondary effects. *11126 Baltimore Blvd. v. Prince George's County, Md.*, 886 F.2d 1415, 1425 (4th Cir. 1989), *vacated on other grounds*, 496 U.S. 901 (1990). In this case, the record was supplemented after oral argument but prior to the decision of the Georgia Supreme Court. The Respondents provided the Georgia Supreme Court with a copy of the lawsuit detailing the incident of July 19, 1996.

in those cases found that the cities had failed to consider any studies at all prior to the enactment of the ordinance. In this case, it is undisputed that the City of Marietta followed the mandates of this Court by relying on specific evidence of pernicious secondary effects prior to the passage of its ordinance. The Georgia Supreme Court has diligently reviewed the evidence in the numerous adult entertainment cases presented to the Court, and consistently struck down those ordinances where the cities failed to follow the guidelines established by *City of Renton.*[17]

III.

THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONER'S DUE PROCESS ARGUMENTS REGARDING TWENTY-FOUR HOURS NOTICE, NO OPPORTUNITY TO PRESENT EVIDENCE, NO CROSS-EXAMINATION, AND TEN MINUTES PRESENTATION AT THE PUBLIC HEARING.

This Court wisely refuses to review judgments rendered by the highest court of a state unless a federal question has been both raised and decided in the state court below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (in reviewing judgments of state courts under 28 U.S.C. § 1257, the Court will refuse to consider claims that were not raised or addressed below.) The law in Georgia is equally clear: Appellate courts will not consider issues raised for the first time on appeal. *Dukes v. State*, 1997 WL 20912 (Ga.

17. In *Secret Desires Lingerie, Inc. v. City of Atlanta*, 266 Ga. 760, 470 S.E. 2d 879 (1996), the Georgia Supreme Court struck down an ordinance regulating lingerie modeling studios on the grounds that the city did not consider evidence of the pernicious secondary effects of such studios prior to enactment of the ordinance. Similarly, several months earlier, the Georgia Supreme Court in *Chambers d/b/a "Neon Cowboy" v. Peach County*, 266 Ga. 318, 467 S.E. 2d 519 (1996) struck down an ordinance regulating adult entertainment finding that the county had not relied on evidence reasonably related to the problem of undesirable secondary effects of such businesses. *See also Discotheque, Inc. v. City Council of Augusta*, 264 Ga. 623, 449 S.E. 2d 608 (1994).

App. 1997); *Kim v. McCullom*, 222 Ga. App. 439, 474 S.E. 2d 654 (1996). Furthermore, arguments included as enumerations of error in the court below which are unsupported by argument or citation of authority are deemed abandoned. *See* Rule 22 of the Georgia Supreme Court Rules.

In this case, Petitioner presents a question that was not properly preserved for review. The issue of due process in the context of the adequacy of twenty-four notice, cross-examination, an opportunity to present evidence and ten minutes presentation was an argument presented to the trial court. The trial court properly concluded that because Petitioners did not have a property interest or vested right in their licenses, they were not entitled to cross-examination at the public hearing. The trial court also concluded that the notice provided and procedure adopted by the City with respect to the hearing process were adequate. Upon appeal of the trial court's order, Appellant Boomer's was the only Appellant to raise the issue of the hearing procedures by enumeration of error. However, Boomer's failed to support such enumeration of error with supporting argument and citation of authority and therefore waived such argument pursuant to Rule 22 of the Georgia Supreme Court Rules. In this regard, the Georgia Supreme Court did not even address the issue and its opinion does not in any way reference the due process claims as related to questions of cross-examination, opportunity to present evidence, notice of the public hearing and the hearing procedures. Therefore, this Court does not have jurisdiction to consider Petitioner's question III.

Notwithstanding Petitioner's waiver, there is no merit to the argument. Prior to the adoption of the ordinance at issue, the City posted notice of the public hearing and notified the existing adult entertainment establishments that a meeting would be held.[18] At

18. Notice was posted in accordance with O.C.G.A. § 50-14-1, Georgia's Open Meetings Act, and although not required by statute, all three adult entertainment clubs in the City were personally served with written notification more than twenty-four hours prior to the meeting. A copy of the notification was placed in the trial court record.

the public hearing, counsel for two of the adult entertainment clubs testified before City Council and were allowed an opportunity to be heard. Petitioners were not entitled to anything further since the ordinance was adopted as result of a legislative decision. "The legislative determination provides all the process that is due." *Atkins v. Parker*, 472 U.S. 115, 129-30 (1985). This was not an administrative enforcement proceeding in which Petitioners' licenses were suspended or revoked due to misconduct or city code violations.[19] Instead, the Marietta City Council, through the legislative process, altered the conditions for obtaining a license beginning on January 1, 1996. The Ordinance does not apply only to the Petitioners but to all who apply for licenses in 1996. As to Petitioners' right to cross-examination, there is no such right. Cross-examination is an element of procedural due process which is implicated only where a vested right is threatened by government action. *See Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). It was clearly established by the courts below that Petitioners did not have a vested right to the renewal of their licenses, and therefore, the right of cross-examination was not implicated in this case.

IV.

AS PETITIONERS DID NOT HAVE A VESTED RIGHT TO THE RENEWAL OF THEIR LICENSES, THEIR ARGUMENT THAT THEIR PROPERTY HAS BEEN TAKEN WITHOUT JUST COMPENSATION IN CONTRAVENTION OF THE FIFTH AND FOURTEENTH AMENDMENTS MUST FAIL.

At the heart of the Georgia Supreme Court's opinion is the discussion of whether there is a property interest or vested right in the renewal of an annual license. "To have a property interest . . . , a person clearly must have more than an abstract need or desire for

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19. *See* Marietta City Code, Section 8-8-2-220(B) and (C).

it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Although the United States Constitution does protect property under the due process clause of the Fourteenth Amendment[20], it does not define what is "property". That is because it is the power of the state and local governments to define "property". *Id.* "[P]roperty interests do not spring forth from the United States Constitution, but are created and defined by statutes, rules, or understandings 'that secure certain benefits and that support claims of entitlement to those benefits' " *Id.* It is not the label that is determinative but the application of the statute.

In this case, for the renewal of a license to fall under the protective umbrella of the Fourteenth Amendment, it must be considered property by the laws of the State of Georgia. Both the trial court and the Georgia Supreme Court concluded that the Petitioners did not have a vested property interest in the renewal of their licenses. Accordingly, the Petitioners have no Fourteenth Amendment protection, and there is no federal question presented for review to this Court.

At first glance, it appears there is a difference in opinion among the various jurisdictions as to whether a renewal of a license is a vested property right. Compare *Las Fuentes, Inc. v. City of Chicago*, 567 N.E. 2d 1093 (Ill. App. Ct. 1991) and *Replogle v. Commonwealth*, 506 A.2d 499, 500 (Penn. 1986) where the Illinois and Pennsylvania appellate courts held that the renewal of a liquor license is not a vested property interest with *Bundo v. Walled Lake*, 238 N.W. 2d 154 (Mich. 1976) and *Bosselman v. State of Nebraska*, 432 N.W. 2d 226 (Neb. 1988) where the Michigan and Nebraska Supreme Courts ruled that a licensee had a property interest in the renewal of a liquor license.

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20. The Fourteenth Amendment to the United States Constitution provides that a state cannot take property without due process and just compensation.

However, a closer look reveals that the determination of property rights depends on the statute governing renewal. The state statutes dealing with renewal can be divided into two categories: those establishing a perpetual renewal and those establishing a provisional or annual renewal. Courts analyzing the former have concluded that there is a vested interest in renewal while no such interest exists where the renewal is annual or provisional.

In this case, Georgia's renewal statute for alcohol licenses is not perpetual. A liquor license in Georgia expires on an annual basis, and there is no guarantee of renewal. O.C.G.A. § 3-2-7. The licensee obtains a license with full knowledge that there are no assurances that the licensing requirements will remain the same. *Ficarra v. Department of Regulatory Agencies*, 849 P.2d 6 (Colo. 1993). In *Ficarra*, the Supreme Court of Colorado held that a licensee who relies upon the requirements not changing does so at his own peril. *Id.* at 19.

It is recognized, however, that there is a vested right to the license for the term it is issued. *Replogle v. Commonwealth*, 506 A.2d 499, 500 (Penn. 1986). In this case, the Petitioners had a vested right to the license for the one year period and the Georgia Supreme Court recognized this right. However, once the license expires, the licensee's property interest expires, and he does not gain a new interest until the license is renewed. *Id.* Reliance by a licensee on renewal does not create a vested interest. Rather, it is the renewal statute which gives rise to a vested interest. *Triple A Services, Inc. v. Rice*, 545 N.E. 2d 706, 714 (Ill. 1989). *See also Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716 (8th Cir. 1995); *Polenz v. Parrott*, 883 F.2d 551 (7th Cir. 1989); *Zenco Development Corp. v. City of Overland*, 843 F.2d 1117 (8th Cir. 1988).

As it is clear that Petitioners possessed no vested right to the renewal of its licenses based on their annual expiration, there has

been no "taking". Additionally, the "taking" claim must fail as Petitioners have not been deprived of all viable economic uses of their property. Therefore, Petitioner's reliance on *Lucas v. South Carolina Coastal Council*, 505 U.S. 1009 (1992) is misplaced.[21]

First of all, this case is not a zoning case where Petitioners seek to alter the use of their land, but one which involves two business licenses. Further, in that case, this Court held that land use regulations that deny *all* economically beneficial or productive use of an entire parcel of land generally effect a taking. *Id.* at 2900 (emphasis added). However, this Court did not reach the taking issue as the case was then remanded to the South Carolina Supreme Court to identify principles of nuisance and property law.

In this case, Petitioners are not denied of *all* economic use of an entire parcel of land. The trial court reached this same conclusion and stated:

> [t]he Plaintiffs are free to continue the operation of their business as adult entertainment establishments, without the consumption of alcohol by their patrons, or as bars or nightclubs, without the provision of adult entertainment for their patrons.

(Appendix at 55).

Similarly, in *S.J.T., Inc. v. Richmond County*, 263 Ga. 267,

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21. The condemnees in *Threatt v. Fulton County*, 266 Ga. 466, 467 S.E. 2d 546 (1996) attempted to rely on *Lucas v. South Carolina Coastal Authority, supra*, in support of their claim that their property had been taken without just compensation, and the court rejected this argument finding that *Lucas* did not apply where there had been no showing that the regulation at issue had deprived condemnees of any or all economically viable or beneficial use of their property. *Id.* at 550.

430 S.E. 2d 726, 730 (1993), the appellant argued that an ordinance regulating adult entertainment denied them due process by forcing them to derive income from sources other than from the sale of alcoholic beverages. The court found that the licenses issued to appellant did not establish any vested right, contractual or otherwise, to operate both a bar and offer nude dancing.

The Georgia Supreme Court simply concluded that without a property interest or vested right in the renewal of a license, there can be no argument that Petitioner's property has been taken without just compensation. *See* Appendix 1 at 28.

CONCLUSION

Respondent respectfully requests that Petitioner's Petition for a Writ of Certiorari be denied based on the reasons set forth above.

Respectfully submitted,

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Attorneys for Respondents

APPENDIX A — CODE OF ORDINANCE OF THE CITY OF MARIETTA, GEORGIA, SECTION 8-5032

COUNCIL BILL NO. 400195 ORDINANCE BILL NO. 5399

AN ORDINANCE

Findings; Public Purpose; Legal Authority. (a) Based upon the experience of other urban counties and municipalities, which experiences we believe are relevant to the problems faced by City of Marietta, Georgia, and based upon a review of a report from the Marietta City Police Department summarizing the criminal activity surrounding the three (3) existing license holders within the City of Marietta, we take note of the notorious and self-evident conditions attendant to the commercial exploitation of human sexuality, which do not vary greatly among generally comparable communities within our country. Moreover, it is the finding of the City Council of Marietta that public nudity (either partial or total) under certain circumstances, particularly circumstances related to the sale and consumption of alcoholic beverages in so-called "nude bars" or establishments offering so-called "nude entertainment" or "adult entertainment", begets criminal behavior and tends to create undesirable community conditions. Among the undesirable community conditions identified with nudity and alcohol are depression of property values in the surrounding neighborhood, increased expenditure for the allocation of law enforcement personnel to preserve law and order, increased burden on the judicial system as a consequence of the criminal behavior hereinabove described, and acceleration of community blight by the concentration of such establishments in particular areas. Therefore, the limitation of nude conduct in establishments licensed to sell alcohol for consumption on the premises is in the public welfare and it is a matter of governmental interest and concern to prevent the occurrence of criminal behavior and

undesirable community conditions normally associated with establishments which serve alcohol and also allow and/or encourage nudity. To that end, this Ordinance is hereby adopted.

(b) This ordinance is also adopted pursuant to the authority granted by Article III, Section VI, Paragraph VII of the Constitution of the State of Georgia.

(c) This ordinance is further adopted to protect the public safety, health and welfare.

BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF MARIETTA, GEORGIA, THAT:

Section 1. The Code of Marietta, Georgia, is hereby amended to add section 8-5032 which shall read as follows:

"*8-5032*

a) No person, association, partnership or corporation licensed under Chapter 5 of Part 8 (8-5001 et seq.) of the Marietta City Code after the effective date of this ordinance shall serve, sell, distribute or suffer the consumption or possession of any intoxicating liquor, beer or wine or controlled substance upon the premises of any licensee. Any licensee whose license was granted prior to the adoption of this amendment shall not be subject to this amendment until December 31, 1995, at which time all licensees within the City of Marietta shall be subject to this provision,

including those licensees licensed before the effective date hereof.

b) This section (8-5032) shall not apply nor prohibit the live performance of legitimate plays, operas, ballets at mainstream theaters, concerts halls, museums or educational institutions holding a license, which derive less than twenty (20%) of its gross receipts from the sale of alcoholic beverages."

Section 2. It is hereby declared to be the intention of this Ordinance that its sections, paragraphs, sentences, clauses and phrases are severable, and if any section, paragraph, sentence, clause or phrase of this Ordinance is declared to be unconstitutional or invalid, it shall not affect any of the remaining sections, paragraphs, sentences, clauses or phrases of this Ordinance.

Section 3. All Ordinances or parts of Ordinances in conflict with this Ordinance are hereby repealed.

Section 4. This Ordinance shall become effective upon the signature or without the signature of the Mayor, subject to Georgia laws 1983, page 4119.

DATE: January 19, 1995 APPROVED:

s/ Ansley L. Meaders
ANSLEY LITTLE MEADERS, Mayor

Appendix A

ATTEST:

s/ Sheila R. Hill
SHEILA R. HILL, City Clerk

APPROVED AS TO FORM:

s/ Douglas R. Haynie
DOUGLAS R. HAYNIE, CITY ATTORNEY

BEST AVAILABLE COPY

City Of Marietta Business License Division

205 LAWRENCE ST., N.E. • DRAWER 609 • MARIETTA, GA. 30061

404-528-0590

BUSINESS LICENSE

PLEASE DISPLAY AT ALL TIMES

SUBJECT TO ALL ORDINANCES OF MAYOR AND COUNCIL

NOT TRANSFERABLE

LICENSE NUMBER 95-21273

ACCOUNT NO 9901117 5813035
REVENUE CODE

FOR YEAR 1995
THIS LICENSE EXPIRES 12/31/95
BEGIN OPERATION DATE 0/00/00

COMPANY

CLUB TAJ MAHAL
1830 COBB PARKWAY SOUTH
MARIETTA GA 30062-3755

NOTIFY THIS OFFICE OF ANY CHANGE OF ADDRESS, OWNERSHIP, FIRM NAME, OR CLASSIFICATION.

OWNER: SHRETTA MUKESH 404-000-0000

LICENSE DESCRIPTION

BEER/WINE CONSUMPTION ON PREM/CABARET $ 1110.00

GOLD RUSH II INC

BUSINESS ADDRESS:
1830 COBB PARKWAY SOUTH
MARIETTA GA 30062-3755

THE CITY OF MARIETTA
1834

TOTAL $ 1110.00

SIGNED Darrell E Dickerson DATE PAID 10/17/94 PENALTY $ .00

DARRELL E DICKERSON

BUSINESS LICENSE DIVISION TOTAL $ 1110.00

APPENDIX C — ARTICLE III, SECTION VI, PARAGRAPH VII OF THE CONSTITUTION OF THE STATE OF GEORGIA

GEORGIA CONSTITUTION

Paragraph VII. Regulation of alcoholic beverages.

The State of Georgia shall have full and complete authority to regulate alcoholic beverages and to regulate, restrict, or prohibit activities involving alcoholic beverages. This regulatory authority of the state shall include all such regulatory authority as is permitted to the states under the Twenty-First Amendment to the United States Constitution. This regulatory authority of the state is specifically delegated to counties and municipalities of the state for the purpose of regulating, restricting, or prohibiting the exhibition of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages; and such delegated regulatory authority may be exercised by the adoption and enforcement of regulatory ordinances by the counties and municipalities of this state. A general law exercising such regulatory authority shall control over conflicting provisions of any local ordinance but shall not preempt any local ordinance provisions not in direct conflict with general law.

APPENDIX D — OFFICIAL CODE OF GEORGIA ANNOTATED, SECTION 3-2-7

3-2-7. Expiration and renewal of licenses generally; continuation of operations by licensee pending final approval or disapproval of application for renewal; penalty for late application for renewal; temporary permits.

(a) Except as otherwise specifically provided in this title, all licenses issued pursuant to this title shall expire on December 31 of each year and application for renewal shall be made annually on or before November 1.

(b) Any licensee making proper application, with all supporting documents, for a license to operate during the following calendar year and having filed the application prior to November 1 shall be permitted to continue to operate pending final approval or disapproval of the licensee's application for the following year if final approval or disapproval is not granted prior to January 1.

APPENDIX E — AFFIDAVIT OF COUNCILMAN FRANK T. AYERS

AFFIDAVIT OF FRANK T. AYERS

PERSONALLY before the undersigned officer, duly authorized by law to administer oaths, came Frank T. Ayers, who, after being sworn, deposes as follows:

1.

This affidavit is based upon my personal knowledge.

2.

My name is Frank T. Ayers, and I am the elected official representing Ward 6 of the City of Marietta, Georgia. I am currently the elected official for said position and was the elected official for said position on January 19, 1995.

3.

I attended the specially called meeting of the Marietta City Council on January 19, 1995, which commenced at approximately 6:00 p.m. and adjourned at approximately 10:00 p.m.

4.

At the conclusion of said meeting, I voted for the passage of Council Bill No. 400195, Ordinance Bill No. 5399, which is marked as "P-8" in my deposition.

Appendix E

5.

My vote on this Ordinance was an act carried out by me in my official capacity as the elected official for Ward 6 of the City of Marietta, Georgia and my vote was within my official duty as such elected official.

6.

My vote was taken in good faith and was not done or taken oppressively, maliciously, or corruptly. In voting on said Ordinance, it was not my intention to cause injury or damage to any specific person, firm, entity or organization; rather, it was my intention to adopt an Ordinance having general application throughout the City of Marietta.

7.

In voting on said Ordinance, I did not receive any pecuniary gain as a result of said vote, other than the normal salary set forth in the Marietta City Charter.

8.

In voting on said Ordinance, I was acting in a legislative capacity and performing a legislative function.

9.

In voting on said Ordinance, I relied upon the studies contained in the Record and contained in my deposition. I found said studies to be relevant to the City of Marietta, the problems faced by the City of Marietta and the problems addressed in the

Appendix E

Ordinance. I also relied upon the testimony and evidence presented at the public hearing. I also relied upon the advice of the City Attorney and the Constitutional Amendment approved by the voters of this State on November 8, 1994.

10.

My only motives for voting for said Ordinance are those stated in the preamble of said Ordinance. My personal feelings on any subject matter contained in said Ordinance did not enter into my vote.

This 5 day of December 1995.

s/ Frank T. Ayers
FRANK T. AYERS

Sworn to and Subscribed before me this
5 day of December, 1995.

s/ Shaun Renae Gee
Notary Public